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A Virginia subscriber who stands high in the profession, thinks that, in our editorial criticism of the Colorado case of Field v. Small, 36 Cent. L. J. 49, we "have said what we did not intend or else have done the learned court injustice." In a letter to us, after quoting the language of the court, to which we took exception, and also our comment thereon, he adds: "Let me ask if the statute of frauds (29 Car. II., and, I presume, adopted in that form in Colorado as in most of the States) does not in terms declare that no action shall be brought on such a contract unless signed by the party to be charged? And if it is not a fact that no reputable court, since the statute was enacted, has undertaken to enforce such a contract against a party who had not signed—save in the exceptional cases of fraud, part performance etc., not involved here. In the case in point, Field was bound because he had signed, but the contract could not have been enforced as against Small who, as the 'party to be charged' had not signed and whose promise was therefore within the very terms of the statute. I find no authority, reputable or otherwise, the other way."

Our friend has committed an error which though natural, is hardly to be looked for in one with his legal experience. The term "party to be charged" does not mean the purchaser. The statute of frauds was passed for the protection of land owners and was intended to guard them against perjuries in the proof of parol contracts. It has been held repeatedly, and is now elementary law, that only the vendor or grantor must, under the statute sign the memorandum.

There are hosts of authorities from innumerable courts, supporting this. The question was fully considered by Chancellor Kent in Clason v. Bailey, 14 Johns. 484, and although he agreed with Lord Chancellor Redesdale in Lawrenson v. Butler, Sch. & Lef. 13, that on principle the contract ought to be mutual and ought not to be enforced in equity unless each party might have the same right, yet he felt himself bound by the authorities which were then too well-settled to be disturbed. In the case at hand, the contract being signed by the vendor, was a sufficient compliance with the statute to bind him, but so far as Small was concerned he might or might not be bound, according to whether or not there was a legal acceptance, expressed or implied, by him of the contract. But for the court to say or intimate, as it did, that because the written contract was not signed by either Mr. or Mrs. Small, therefore they could not be bound, is, as we said before, utterly unwarranted and unsupported by precedent.

The Case of Calbert v. Shepherd, in which the Supreme Court of Virginia very properly refused to sanction the sale of the lot of ground near Fredericksburg, in which repose the remains of the mother of George Washington, illustrates the unseemly greed of a class of modern real estate brokers, and gives the court an opportunity to render a judicial eulogy upon the life and services of Washington, which in point of appropriateness and beauty of language, is not excelled by poet or historian. It is difficult to read the opinion without being impressed with the remarkable nerve of the broker who undertook to sell, at public auction, as per advertisement addressed "to the ladies attending the inauguration of president elect Harrison" * * * "the grave of Mary, the mother of General George Washington." The broker claimed that he had an option on the ground surrounding and including the tomb. The fact was that the owner gave to plaintiff an option on a tract "containing about two acres of land with the Mary Washington monument and large marble shaft thereon." The deed from the owner's grantor, distinctly reserved the burial ground and monument and the language used in the option, as quoted, was undoubtedly intended as merely descriptive of the tract and so the court held, in addition to the finding that there was a complete dedication of the tomb to public and pious uses. The act of the agent was very properly characterized as a "scandalous reflection upon a civilized Christian community" and the record of this case in which the brazen broker seeks damages from the owner for failure to execute the alleged contract of sale, presents for review "the sacrilegious and shockingly shameful spectacle of a contro-

versy and traffic over the grave and sacred ashes of Mrs. Mary Washington, the honored and revered mother of the transcedent man of all ages, who in the annals of the world is without a prototype, a peer or a parallel." It is very probable, in view of the caustic language of the court, that the broker will be reluctant hereafter to undertake the sale of tombs, mausoleums or cemeteries.

NOTES OF RECENT DECISIONS.

NUISANCE — SURFACE WATER — DAMAGES PENDING SUIT.—In Joseph Schiltz Brewing Co. v. Compton, 32 N. E. Rep. 693, the Supreme court of Illinois decide that in an action for damages arising from water running upon plaintiff's property from an adjoining building erected by defendant on his own land, damages cannot be recovered for injuries inflicted after the commencement of the action, since a nuisance caused by a private structure is not regarded by the law as permanent in its nature and therefore each injury caused by it constitutes a separate cause of action. Magruder, J., says:

The rule originally, at common law, was that in personal actions damages could be recovered only up to the time of the commencement of the action. 3 Com. Dig. tit. "Damages," D. The rule subsequently prevailing in such actions is that damages accruing after the commencement of the suit may be recovered, if they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action. Wood's Mayne, Dam. § 103; Birchard v. Booth, 4 Wis. 67; Slater v. Rink, 18 Ill. 527; Fetter v. Beale, 1 Salk. 11; Howell v. Goodrich, 69 Ill. 556. In actions of trespass to the realty, it is said that damages may be recovered up to the time of the verdict (Com. Dig. 363, tit. "Damages," D); and the reason why, in such cases, all the damages may be recovered in a single action, is that the trespass is the cause of action, and the injury resulting is merely the result of damages. 5 Amer. & Eng. Enc. Law, p. 16, case cited in note 2. But in the case of nuisances or repeated trespasses recovery can ordinarily be had only up to the commencement of the suit, because every continuance or repetition of the nuisance gives rise to a new cause of action, and the plaintiff may bring successive actions as long as the nuisance lasts. McConnel v. Kibbe, 29 Ill. 483, and 33 Ill. 175; Railroad Co. v. Moffitt, 75 Ill. 524; Railroad Co. v. Schaffer, 124 Ill. 112, 16 N. E. Rep. 239. The cause of action, in case of an ordinary nuisance, is not so much the act of the defendant as the injurious consequences resulting from his act, and hence the cause of action does not arise until such consequences occur; nor can the damages be estimated beyond the date of bringing the first suit. 5 Amer. & Eng. Enc. Law, p. 17, and cases in notes. It has been held, however, that where permanent structures are erected, resulting in injury to adjacent realty, all damages may be recovered in a single suit. *Id.* p. 20, and cases in note.

But there is much confusion among the authorities which attempt to distinguish between cases where successive actions lie and those in which only one action may be distinguished. This confusion seems to arise from the different views entertained in regard to the circumstances under which the injury suffered by the plaintiff from the act of the defendant shall be regarded as a permanent injury. "The chief difficulty in this subject concerns acts which result in what effects a permanent change in the plaintiff's land, and is at the same time a nuisance or trespass." Sedg. Dam. (8th Ed.) § 94. Some cases hold it to be unreasonable to assume that a nuisance or illegal act will continue forever, and therefore refuse to give entire damages as for a permanent injury, but allow such damages for the continuation of the wrong as accrued up to the date of the bringing of the suit. Other cases take the ground that the entire controversy should be settled in a single suit, and that damages should be allowed for the whole injury, past and prospective, if such injury be proven with reasonable certainty to be permanent in its character. *Id.* § 94. We think, upon the whole, that the more correct view is presented in the former class of cases. 1 Suth. Dam. 199-202; 3 Suth. Dam. 369-399; 1 Sedg. Dam. (8th Ed.) §§ 91-94; Uline v. Railroad Co., 101 N. Y. 98, 4 N. E. Rep. 536; Duryea v. Mayor, 26 Hun, 120; Blunt v. McCormick, 3 Denio, 283; Cooke v. England, 92 Amer. Dec. 630, notes; Reed v. State, 168 N. Y. 407, 15 N. E. Rep. 735; Hargreaves v. Kimberly, 26 W. Va. 787; Ottenot v. Railroad Co., 119 N. Y. 603, 23 N. E. Rep. 169; Cobb v. Smith, 38 Wis. 21; Canal Co. v. Wright, 21 N. J. Law, 469; Wells v. Northampton Co., 151 Mass. 46, 23 N. E. Rep. 724; Barrick v. Shifferdecker, 123 N. Y. 52, 25 N. E. Rep. 356; Silsby Manuf'g Co. v. State, 104 N. Y. 562, 11 N. E. Rep. 264; Aldworth v. City of Lynn, 153 Mass. 53, 26 N. E. Rep. 229; Town of Troy v. Railroad Co., 23 N. H. 83; Cooper v. Randall, 59 Ill. 317; Railroad Co. v. Hoag, 90 Ill. 339. We do not wish to be understood, however, as holding that the rule laid down in the second class of cases is not applicable under some circumstances, as in the case of permanent injury caused by lawful public structures, properly constructed and permanent in their character. In Uline v. Railroad Co., *supra*, a railroad company raised the grade of the street in front of plaintiff's lots so as to pour the water therefrom down over the sidewalk into the basement of the houses, flooding the same with water, and rendering them damp, unhealthy, etc., and injuring the rental value, etc. In discussing the question of the damages to which the plaintiff was entitled the court say: "The question, however, still remains, what damages? All her damages upon the assumption that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? . . . There has never been in this State before this case the least doubt expressed in any judicial decision . . . that the plaintiff in such a case, is entitled to recover only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the courts, and it is the prevailing doctrine elsewhere." Then follows the exhaustive review of the authorities, which sustain the conclusion of the court as above announced. In Duryea v. Mayor, *supra*, the action was brought to recover damages occasioned by the wrongful acts of one who had discharged water and sewerage upon the land of another, and it was held that no recovery could be had for damages occasioned by the discharge of the water and sewage upon the land after commencement of the action. In Blunt v. McCormack, *supra*,

the action was brought by a tenant to recover damages against his landlord because of the latter's erection of a building adjoining the demised premises, which shut out the light from the tenant's windows and doors; and it was held that damages could only be recovered for the time which had elapsed when the suit was commenced, and not for the whole term. In Hargreaves v. Kimberly, *supra*, the action was case to recover damages for causing surface water to flow on plaintiff's lot, and for injury to his trees by the use of coke ovens near said lot, and for injury thereby to his health and comfort; and it was held to be error to permit a witness to answer the following question: "What will be the future damages to the property from the acts of the defendant?" the court saying: "In all those cases where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but when the cause of the injury is in the nature of a nuisance and not permanent in its character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage which it may inflict if permanent, then the entire damage cannot be recovered in a single action; but actions may be maintained from time to time as long as the cause of the injury continues." In Wells v. Northampton Co., *supra*, where a railroad company maintained a culvert under its embankment, which inpaired land by discharging water on it, it was held that the case fell within the ordinary rule applicable to continuing nuisances and continuing trespasses. Reference was made to Uline v. Railroad Co., *supra*, and the following language was used by the court: "If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful as against the plaintiff, unless by release or grant by prescription or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner." In Aldworth v. City of Lynn, *supra*, where the action was for damages sustained by a landowner through the improper erection and maintenance of a dam and reservoir by the City of Lynn on adjoining land, the Supreme Court of Massachusetts say: "The plaintiff excepted to the ruling that she was entitled to recover damages only to the date of her writ, and contended that the dam and pond were permanent, and that she was entitled to damages for a permanent injury to her property. An erection unlawfully maintained on one's own land, to the detriment of the land of a neighbor, is a continuing nuisance, for the maintenance of which an action may be brought at any time, and damages recovered up to the time of bringing the suit. . . . That it is of a permanent character, or that it has been continued for any length of time less than what is necessary to acquire a prescriptive right, does not make it lawful, nor deprive the adjacent land owner of his right to recover damages. Nor can the adjacent land owner, in such a case, who sues for damages to his property, compel the defendant to pay damages for the future. The defendant may prefer to change his use of his property so far as to make his conduct lawful. In the present case we cannot say that the defendant may not repair or reconstruct its dam and reservoir in such a way as to prevent percolation with much less expenditure than would be required to pay damages for a permanent injury to the plaintiff's land."

In the case at bar the defendant did not erect the house upon plaintiff's land, but upon its own land. It does not appear that such change might not be made in the roof, or in the manner of discharging the water from the roof, as to avoid the injury complained of. The first count of the declaration, by its express terms, limits the recovery for damages arising from the negligent and improper construction of defendant's building to such injuries as were inflicted "before the commencement of the suit." The second count was framed in such a way as to authorize a recovery of damages for the flow of water upon plaintiff's premises from some other cause than the wrongful construction of defendant's building; and accordingly plaintiff's evidence tends to show that the eave trough, designed to carry off the water from the roof, was so placed as to fail of the purpose for which it was intended. It cannot be said that the eave trough was a structure of such a permanent character that it might not be changed, nor can it be said that the defendant would not remove the cause of the injury rather than submit to a recovery of entire damages for a permanent injury, or suffer repeated recoveries during the continuance of the injury. The facts in the record tend to show a continuing nuisance, as the same is defined in Aldworth v. City of Lynn, *supra*. There is a legal obligation to remove a nuisance; and "the law will not presume the continuance of the wrong, or allow a license to continue a wrong, or trespass of title, to result from the recovery of damages for prospective misconduct." 1 Suth. Dam. 199, and notes. The question now under consideration has been before this court in Cooper v. Randall, *supra*. The action was for damages to plaintiff's premises, caused by constructing and operating a flouring mill on a lot near said premises whereby chaff, dust, dirt, etc., were thrown from the mill into plaintiff's house. It was there held that the trial court committed no error in refusing to permit the plaintiff to prove that the chaff thrown upon his premises by the mill after the suit was commenced had seriously impaired the value of the property, and prevented the renting of the house; and we there said: "When subsequent damages are produced by subsequent acts, then the damages should be strictly confined to those sustained before suit brought." It is true that the operation of the mill, causing the dust to fly, was the act of the defendant; but it cannot be said that it was not the continuing act of the present appellant to allow the roof of the eave trough to remain in such a condition as to send the water against appellee's house upon the occurrence of a rain storm. Nor is appellant's house or eave trough any more permanent than was the mill in the Cooper Case. In Railroad Co. v. Hoag, *supra*, a railroad company had turned its waste water from a tank upon the premises of the plaintiff, where it spread and froze, and a recovery was allowed for damages suffered after the commencement of the suit; but it there appeared that the ice, which caused the damage, was upon plaintiff's premises before the beginning of the suit, and the damage caused resulted from the melting of the ice after the suit was brought. It was there said: "The injury sustained by appellee between the commencement of the suit and the trial was not from any wrongful act done by appellant during that time, but followed from acts done before the suit was commenced." Here, the water, which caused the injury, was not upon plaintiff's premises, either in a congealed or liquid state, before the beginning of the suit, but flowed thereon as the result of rain storms which occurred after the suit was commenced. We think the correct rule upon this subject is stated as follows: "If

a private structure or other work on land is the cause of a nuisance or other tort to the plaintiff, the law cannot regard it as permanent, no matter with what intention it was built; and damages can therefore be recovered only to the date of the action." 1 Sedg. Dam. (8th Ed.) § 93.

GIFT OF BANK DEPOSIT.

1. Gift Defined.
2. Definition of *Donatio Inter Vivos*.
3. Deposit in Trust.
4. Deposit in Joint Names.
   a. Delivery of Bank Book.
5. Deposit in Name of Another.
   a. Deposit in Name of an Infant.
   b. Retention of Pass-book by Depositor.
   c. Delivery of Pass-book to Donee.

1. *Gift Defined.*—Every transfer of property, where there is no consideration passes between the parties — nothing is paid or agreed to be paid, the transaction is a gift and not a sale.[1] Whether a transfer of personal property is a sale or a gift is always a question of fact depending upon the intention of the parties to the transfer.[2] Thus it has been said that the transfer of bank stock by a father to an adult son, who had assisted him in the transaction of his business for several years, for which no charge was made, is a gift and not a sale.[3] Gifts are of two kinds or classes, to-wit: Those that are made to take effect presently, and are absolute and irrevocable; and these that are designed to take effect in the future, on the death of the donor, either from a present disease or an impending peril, and are revocable on the safe passage of the peril or a recovery from the sickness.

2. *Definition of a Donatio Inter Vivos.*—A gift *inter vivos* is an immediate, voluntary, and gratuitous transfer of property by one person to another.[4] To constitute a valid gift of this character there must be a subject capable of delivery,[5] and an actual delivery at the time of the thing given;[6] that is, the donor must consummate his intention, and carrying it into effect, by doing those acts which the law requires to be done, to divest the donor and invest the donee with the right of property.[7] There must not only be actual delivery of the thing given, or something equivalent thereto,[8] but a parting with the present and future dominion over the property.

3. *Deposit in Trust.*—Money deposited in a savings bank by one in trust for another, has been held to raise a presumption of an intention to give, and that upon the death of the depositor the money belongs to the beneficiary.[9] In such a case the donee of the money deposited may recover the amount against the bank, where, after notice of the donee's rights, the bank pays the deposit to the administrator of the donor.[10] Thus in a case where the pass-book of a savings bank showed a deposit "in account with John White for Elizabeth White," it was held that after the death of both parties, the representatives of the latter have a right to the money.[11] In the case of Miner v. Rogers,[12] where a widow, with a considerable estate and no children, deposited in a savings bank $250 in her own name as trustee for W, a boy of thirteen years old, whose parents were near neighbors and friends, and who was accus

[1] See Kerr's Benjamin on Sales, Vol. I, p. 2, § 4.

[2] See Keiser v. State, 82 Ind. 379; French v. Smith, 58 N. H. 323.

[3] Van Deusen v. Rowley, 4 Seld. (N. Y.) 358.

[4] See Stevens' Estate, 83 Cal. 322, 23 Pac. Rep. 379; Flanders v. Bradley, 45 Ohio St. 108, 12 N. E. Rep. 321; 9 West. Rep. 418.

[5] See Egerton's Exrs. v. Egerton, 2 Gr. (N. J.) 419; Bogan v. Finlay, 19 La. Ann. 94. *Compare* Whiting v. Barrett, 7 Lans. (N. Y.) 107, where it is said that the owner of personal property may make a gift thereof although such property was not *in esse* at the time of the alleged gift.

[6] See Bently v. Cameron, 78 Atl. Rep. 72; Connor v. Trawick's Admr. 37 Ala. 289; Poullain v. Poullain, 79 Ga. 11, 4 S. E. Rep. 81; People v. Johnson, 14 Ill. 342; Daubenspreck v. Briggs, 71 Ind. 255; Peters v. Fort Madison Constr. Co., 72 Iowa, 405, 34 N. W. Rep. 180; Queyrouze v. Thibodeaux, 30 La. Ann., pt. 11, p. 1114; Hanson v. Millett, 55 Me. 184; Snowden v. Reid, 67 Md. 130, 10 Atl. Rep. 175; 8 Cent. Rep. 886; Nasse v. Thomas, 39 Mo. App. 178; Hamilton v. Clark, 25 Mo. App. 428; Blasdel v. Lock, 52 N. H. 238; Hamer v. Sidway, 57 Hun (N. Y.), 228, 42 Alb. L. J. 248; 32 N. Y. St. Rep. 521; 11 N. Y. Supp. 182; Gangiac v. Arden, 10 Johns. (N. Y.) 293; Davis v. Boyd, 6 Jones (N. C. L.), 249; Mechling's App., 2 Grant Cas. (Pa.) 157; Case v. Dennison, 9 R. I. 88; Peeler v. Guilkey, 27 Tex. 355; Frost v. Frost, 33 Vt. 639; Miller v. McMecher, 35 W. Va. 179, 10 S. E. Rep. 378; 6 L. R. A. 515; Board v. Callihan, 33 W. Va. 209, 10 S. E. Rep. 382; Cochrane v. Moore, L. R. 25 Q. B. Div. 57, 42 Alb. L. J. 373, 53 L. T. Rep. (N. S.) 153.

[7] Hunter v. Hunter, 19 Barb. (N. Y.) 631.

[8] *Id.*

[9] Fowler v. Bowery Savings Bank, 47 Hun (N. Y.), 399, 14 N. Y. St. Rep. 515. This case was reversed on other grounds in 113 N. Y. 450, 21 N. E. Rep. 172; 39 Alb. L. J. 468; 23 N. Y. St. Rep. 130; Scott v. Harbeck, 49 Hun (N. Y.), 292, 17 N. Y. St. Rep. 690.

[10] Walsh v. Bowery Savings Bank, 28 N. Y. St. Rep. 402.

[11] Flower v. Bowery Savings Bank, 113 N. Y. 450, 21 N. E. Rep. 172; 23 Abb. N. Cas. (N. Y.) 133; 23 N. Y. St. Rep. 130; 39 Alb. L. J. 468; 4 L. R. A. 145.

[12] 40 Conn. 512.

tomed to do errands for her, being almost daily at her home for the purpose, she often giving him presents in return. Shortly after making the deposit she told the boy's parents that she had deposited that amount in savings bank for their son, and again alluding to it remarked that W would need it for his education. She kept the book herself, and two years afterwards drew out a part of the money, subsequently the balance with accumulated interest, signing receipts in her own name, and appropriating the money to her own use. She died four years later leaving a will in which no allusion was made to the deposit and nothing was given to W. It was found by the court below that at the time she made the deposit she intended to make a gift of the amount to W, to take effect either then or at some future time. The appellate court held that she made a complete gift at the time of the deposit, and could not afterwards revoke it; and that W could recover the amount from her executor in *assumpsit* for money had and received. But in Withers v. Weaver,[13] where there was an assignment of a certificate of deposit in a savings bank, in trust for the son of the assignor, who reserved to himself the right to use the money during his life, and directed the residue to be paid at his death to his son, it was held that there was not such a gift as is required to pass the property for want of an actual delivery, even though the assignee surrendered the certificate and took out a new one during the life of the assignor.

4. *Deposit in Joint Name.*—Where a person deposits money in bank in the name of himself and another there is not such a parting with all present and future control over it as is required to constitute a valid gift of the amount. Thus it is said in the case of Schick v. Crote,[14] that where a husband deposits money in a savings bank, upon the account of himself and wife, this is not enough to show a gift to her,[15] he retaining power to draw the money at will, and in fact drawing the interest upon it on several occasions. In Taylor v. Henry,[16] H, contemplating a departure from home for the benefit of his health deposited in a savings bank $1,850, to the credit of himself and his mother and the surviver of them, subject to the order of either. Afterwards, he went again to the bank, accompanied by his sister, M, and had the name of his mother erased and that of M substituted; so that the account was made to stand in the books: "14,096, H, M, and the surviver of them, subject to the order of either. 1866, April 20, Rec'd eighteen hundred and fifty dollars—$1,850." About a month later he drew out $50 leaving $1,800. He died within four months, and thereupon M obtained the bank-book from his trunk, where it was constantly kept, and drew from the bank the entire balance, with the interest thereon. H left no property other than this money, and by his will made sundry pecuniary bequests. On a bill filed against M and her husband to recover the money drawn from the bank by her, the court said (1), that if the words "and the surviver of them," had been omitted in making the entry in the bank book, the entry would not be sufficient evidence of a complete and perfect gift; that those words, when taken in connection with those which preceded and those which followed them in the entry, did not import either a gift *inter vivos* or a gift *causa mortis;* that having by the terms of the entry retained in himself the power to draw out the money, H did not divest himself with dominion and control over the fund; and (2) that the conclusion to be drawn from all the circumstances was, that the form of the entry in the bank-books was nothing more than a devise by the deceased to subserve his own convenience, and that the sister was solely constituted an agent with power to draw money from the bank to meet some apprehended emergency that might possibly arise in his absence from home.

(*a.*) *Delivery of Bank-book to Donee.*—It seems, however, that where a deposit is made by a person in the name of himself and another, the delivery of the bank-book to that other will have the effect of completing the gift. Thus in the case of Mack v. Mechanics' & Farmers' Bank,[17] the delivery of a savings bank-book to a person in whose name the deposit was made jointly with the depositors, with the message, "tell her to keep it for me," is sufficient to establish a gift of the money.

5. *Deposit in the Name of Another.*—Where

[13] 10 Barr (Pa.), 391.

[14] 42 N. J. Eq. (15 Stew.) 352, 5 Cent. Rep. 826.

[15] See to same effect Matser v. Ward, 2 Redf. (N. Y.) 251.

[16] 48 Md. 550.

[17] 50 Hun (N. Y.), 477, 20 N. Y. St. Rep. 247.

a person deposits money in the name of another, without the knowledge of that other, intending the amount as a gift, it will not be a perfected gift of the amount, because the knowledge and assent of both parties is essential to a valid gift *inter vivos*.[18] Thus where a person deposited money belonging to himself in the name of another person, and the latter died without having any knowledge of the fact of the deposit it was held that the depositor could compel the administrator of the deceased person in whose name the money was deposited, to draw out the money and pay it over to him.[19] In Nutt v. Morse,[20] A deposited money in a savings bank "in trust" for certain relatives, and told them of it, saying that he would control it while he lived, and that, after his death, it was theirs. Just before A died he told these relatives to take the deposit books after his death and make the transfers. The court held that there was not a perfected gift, and that A's administrator was entitled to the money. In the case of Burton v. Bridgeport Savings Bank,[21] Alden Burton, at his death, left two savings bank deposit books, one in his own name, and the other in that of his son "James Burton, order of Alden Burton." On the last page of each was an order, signed by him, to pay the deposit to James. the order in the former book being absolute, and in other book directing payment to be made on his death. Deposits and drafts were made after the dates of the orders. Neither of the books was delivered to James, and he had no knowledge of them, and the court held that there was not a valid gift.

(*a.*) *Deposit in Name of Minor.*—But it is said by the Supreme Court of Maryland in the case of Gardner v. Merrit,[22] that when moneys have been deposited in bank, to the credit of a minor, and the depositor, although retaining control of the fund under a regulation of the bank which permits him to do so, declares, at the time of making the deposit, that it is made for the use and benefit of such minor, the gift is perfected, and the money so deposited becomes the property of such minor. And in Kerrington v. Rautigan,[23] where a woman, unmarried, unembarrassed in business, and supported by a pension and the proceeds of her own labor, deposited money in a savings bank "to the credit of E M guardian." E was her niece, and the proof showed that, at the time the deposit was made she intended it as a gift to E; and that she so informed M, the guardian. The Supreme Court of Connecticut held that this constituted an irrevocable gift.

(*b.*) *Retention of Pass-book by Depositor.*—The general rule may be said to be: Money deposited in bank in another's name, without notice to such other party, but subject to the order of the party making such deposit, who retains control of the fund, does not amount to a gift *inter vivos* of the money;[24] nor is it sufficient evidence of an intention to create a trust.[25] Thus it has been said that the deposit of money in a savings bank in the name of the depositor's son, who does not appear to have known of it, does not show a gift to him, where the depositor retained the pass-book for many years afterwards, dealing with the account as his own, when by the rules of the bank payments could be made to any one presenting the book.[26] In the case of Pope v. Burlington Savings Bank,[27] B deposited money in the defendant savings bank in the name of A, but payable to himself, and kept the deposit book. After having withdrawn more than half the money, he directed the treasurer to change the entry by adding that the words "payable to B," "during his life and after his death to A." In his will, previously made, he confirmed all gifts made or to be made to his children. There was no other evidence of

[18] Alger v. North End. Savings Bank, 146 Mass. 418, 15 N. E. Rep. 916, 5 N. Eng. Rep. 893; Smith v. Ossipee Valley Ten Cent Savings Bank, 64 N. H. 228, 9 Atl. Rep. 792; Orr v. McGregor, 43 Hun (N. Y.), 528; Nutt v. Morse, 142 Mass. 1; Burton v. Bridgeport Savings Bank, 52 Conn. 398, 52 Am. Rep. 602; Beaver v. Beaver, 117 N. Y. 421, 22 N. E. Rep. 940; 27 N. Y. St. Rep. 405; 30 Cent. L. J. 198; 6 L. R. A. 403 rev'g 53 Hun, 258; 25 N. Y. St. St. Rep. 723; 6 N. Y. Sup. 586.

[19] Orr v. McGregor, 43 Hun (N. Y.), 528.

[20] 142 Mass. 1.

[21] 52 Conn. 398, 52 Am. Rep. 602.

[22] 32 Md. 78.

[23] 43 Conn. 17.

[24] See Sherman v. New Bedford Five Cents Savings Bank, 138 Mass. 581; Marcy v. Amezeen, 61 N. H. 131, 60 Am. Rep. 320; Beaver v. Beaver, 117 N. Y. 421; 22 N. E. Rep. 940; 27 N. Y. St. Rep. 405; 30 Cent. L. J. 198; 6 L. R. A. 403, rev'g 53 Hun (N. Y.), 258, 25 N. Y. St. Rep. 723; 6 N. Y. Supp. 586; Pope v. Burlington Savings Bank, 56 Vt. 284, 48 Am. Rep. 781.

[25] Marcy v. Amazeen, 61 N. H. 131, 60 Am. Rep. 320. See Pope v. Burlington Savings Bank, 56 Vt. 284, 48 Am. Rep. 781.

[26] Beaver v. Beaver, 117 N. Y. 421, 22 N. E. Rep. 940; 27 N. Y. St. Rep. 405; 30 Cent. L. J. 198; 6 L. R. A. 403; rev'g 53 Hun (N. Y.), 258, 25 N. Y. St. Rep. 723; 6 N. Y. Supp. 586.

[27] 56 Vt. 248, 48 Am. Rep. 781.

any trust. The deposit could not be drawn without the presentation of the book. A had no knowledge of the transaction. The court held that the deposit could not be sustained as a gift *inter vivos* to A, and also that the bank did not hold the money as trustee for A. In Sherman v. New Bedford Five Cent Savings Bank,[28] A deposited money in a savings bank in B's name, but kept the pass-book, in which there was a condition written that the money should be paid to B after A's death. A drew the interest, and B had no knowledge of the deposit until after A's death. There was not a valid gift and the court held that A's executor, and not B was entitled to a deposit.

There are cases however, that seem to support the theory that such a deposit may be a valid gift. In Scott v. Berkshire County Savings Bank,[29] where A deposited money in B's name, without his knowledge, the court said that the question whether there was a gift to B was one of intent; and that A's declarations, although made afterwards, were competent on the question of intent, as where his acts in taking orders from B, together with A's declarations respecting such acts, preceding and accompanying them. And it was said in Miller v. Clark,[30] that a gift of a deposit in a savings bank is effected where the depositor has new pass-books made in the name of the donees, who are required to sign a signature book in the bank, although the donor retain possession of the books, with the express purpose of preventing the donees from drawing and spending the money during her life, and an entry is made on the books to the effect that the donor alone has power. In the case of Howard v. Windham County Bank,[31] A deposited a sum of money belonging to himself in a savings bank in the name of B, taking a deposit book in which was an entry that B had deposited so much money. The treasurer made a similar entry in the bank book. The court held that the transaction amounted to a complete gift, although the book remained in the possession of A until the decease of B. In the case of Barker v. Frye,[32] F deposited money in a savings bank, stating at the time that the deposit was for the benefit of a grandchild, a memorandum being entered in the book to the effect that F retained control of the deposit during her life-time. Some years afterwards, she stated to the treasurer that she desired to divest herself of her trusteeship and the memorandum thereof was erased. She told the grandchild of what she had done, and that the book would be delivered to him when they met. He replied, requesting that it might be sent to him. The court held that the gift was executed, and F having died, that the grandchild was entitled to the book as against one to whom F, after the acts and correspondence above recited, delivered the book, accompanied by a written order to draw the money. This case, however, is distinguishable from all the others in the fact that there was a clear acceptance of the gift by the donee.

(*c.*) *Delivery of Pass-book to Donee.*—Deposit of money in a bank and delivery of the pass-book to, and acceptance by the donee,[33] constitutes a completed gift of the amount.[34] Thus in Crawford's Case,[35] deposits by a father, made in the presence of his daughter, of money in a bank in her name and for her use, followed by other deposits to her credit entered in a pass-book supplied by the bank and delivered by him to the daughter, were held to constitute a completed present gift of the money deposited.

[28] 138 Mass. 431.
[29] 140 Mass. 157.
[30] 40 Fed. Rep. 15.
[31] 40 Vt. 597.
[32] 75 Me. 29.

[33] Asking that the pass-book be sent to him by an absent donee constitutes an acceptance of the donation. See Barker v. Frye, 75 Me. 29.
[34] Scott v. Berkshire Co. Sav. Bank, 140 Mass. 157, 2 N. E. Rep. 925; 1 N. Eng. 221.
[35] 113 N. Y. 560, 21 N. E. Rep. 692; 23 N. Y. St. Rep. 722.

MURDER — VENUE — SEPARATION OF JURY.

STOUT V. STATE.

Court of Appeals of Maryland, November 17, 1892.

1. Code, art. 27, § 278, provides that, "if any person be feloniously stricken or poisoned in one county, and die of the same stroke or poison in another county, within one year thereafter, the offender shall be tried in the court within whose jurisdiction such county lies where the stroke or poison was given." Held that, where the blow was struck in Maryland, and death ensued in Pennsylvania, the venue in an indictment for murder was properly laid in the county where the blow was struck.

2. Where, before verdict, a sick juror had been separated from his fellow jurors during a recess of the court, and it appeared that he had not been tampered with, a motion to discharge the jury was rightly overruled.

ALVEY, C. J.: This appeal, taken under the act of 1892, (chapter 506,) enacted as section 77, art. 5, of the Code, is from the final judgment of the court below, sentencing the appellant to death on a verdict of murder in the first degree. There are two questions raised. The first is on demurrer to the indictment, in respect to the jurisdiction of the court to try the prisoner because of supposed defect of venue as to the commission of the crime; and the second is presented by bill of exception, as to the supposed illegal separation of the jury during the progress of the trial.

1. As to the demurrer to the indictment. The indictment contains four counts. There is no question made upon either the first or second count, but the third and fourth counts are supposed to be obnoxious to the objection taken to them by demurrer. The demurrer was overruled, and the prisoner then pleaded not guilty, upon which he was tried and convicted. The third count of the indictment charges that the mortal blow was inflicted by the prisoner on the deceased in Cecil county, Md., but that death, in consequence of the wound, subsequently ensued in the city of Philadelphia, in the State of Pennsylvania. In the language of the indictment it is charged that the accused, "on the 1st day of February, 1891, with force and arms, at Cecil county, aforesaid, in and upon one George Ditmar, in," etc., "then and there being, feloniously, willfully, and of his malice aforethought, did make an assault," etc., "and, with a certain stick," etc., "him, the said Ditmar, did then and there, one fatal wound; and of which said mortal wound the said Ditmar, on and from the said 1st day of February, in the year aforesaid, until and upon the 4th day of March, in the year aforesaid, at the county and city of Philadelphia, in the State of Pennsylvania, then and there did languish, and, languishing, did live; on which said 4th day of March, in the year aforesaid, at the county and city last aforesaid, he, the said Ditmar, of the mortal wound aforesaid, died." The fourth count, charging the felonious assault and wounding as in the third, differs from that count in this: that in the fourth count it is charged that the mortal blow was inflicted on the deceased by the accused at Cecil county, Md., with a club, "and that of this mortal wound said Ditmar, on and from the said 1st of February, in the year aforesaid, to the 4th day of March, in the year aforesaid, languished, and, languishing, did live, as well at and in the county aforesaid as at and in the county and city of Philadelphia, in the State of Pennsylvania, then and there did languish, and, languishing, did live, on which said 4th day of March, in the year aforesaid, at and in the county and city of Philadelphia aforesaid, to-wit, at and in Cecil county aforesaid, the said Ditmar, of the mortal wound aforesaid, died." The death occurring in Philadelphia as the result of the mortal wound inflicted in Maryland, the question presented on demurrer to the third and fourth counts of the indictment is one in regard to which some doubts, it would appear, were entertained in the early days of the English common law These doubts seem to have had their foundation in certain maxims and practice that originally obtained in respect to the venue for the trial of facts, the reason for which has long since ceased to exist; it being supposed, in the early periods of the English law, that it was necessary that the jury should come from the vicinage where the matters of fact occurred, and therefore be better qualified to investigate and discover the truth of the transaction than persons living at a distance from the scene could be. Hence the venue was always regarded as a matter of substance; and where, at the common law, the commission of an offense was commenced in one county and consummated in another, the venue could be laid in neither, and the offender went altogether unpunished. And even in the case of murder, if the mortal wound was inflicted or poison administered in one county, and the party died in consequence of the wound or poison in another, it was doubted by some whether the murder could be punished in either county, for it was supposed that a jury of the first could not take cognizance of the death in the second, and a jury of the second could not inquire of the wounding or poisoning in the first; and so the felon would escape punishment altogether. 1 Chit. Crim. Law, 177. This doubt was founded in a mere technicality, and savored so much of a senseless nicety that it was deemed a reproach to the law; and to remove all doubt, and to fix a certain venue for the trial of the crime, the statute of 2 & 3 Edw. VI. was passed, and, after reciting in a long preamble the great failures of justice which arose from such extreme nicety, that statute enacted that in cases of striking or poisoning in one county and death ensuing in another the offender could be indicted, tried, and punished in the district or county where the death happened, as if the whole crime had been perpetrated within the boundary of such district or county. And by the subsequent statute of 2 Geo. II. ch. 21, it was enacted that, where any person feloniously stricken or poisoned at any place out of England shall die of the same in England, or, being feloniously stricken or poisoned in England, shall die of such stroke or poisoning out of England, an indictment thereof, found by the jurors of the county in which either the death or the cause of death shall respectively happen, shall be as good and effectual in law, as well against principals as accessories, as if the offense had been committed in the county where such indictment may be found. The principles or provisions of these two English statutes are not exactly consistent the one with the other, but St. 2 & 3 Edw. VI. ch. 24, is not now applicable or in force in this State, whatever may have been the case prior to our own act of 1809 (chapter 138, § 17); and the statute of 2 Geo. II. ch. 21, was never applicable here, as found by Chancellor Kilty in his Report on the English statutes, published in 1811. By section 278 of article 27 of the Code, codified from section 17 of the act of 1809 (chapter 138), it is provided that, "if any person be feloniously stricken

or poisoned in one county, and die of the same stroke or poison in another county, within one year thereafter, the offender shall be tried in the court within whose jurisdiction such county lies where the stroke or poison was given; and in like manner an accessory to murder or felony committed shall be tried by the court within whose jurisdiction such person became accessory." This statute, as will be observed, conforms neither to St. 2 & 3 Edw. VI. nor to that of 2 Geo. II.; but it is, as we think is manifest, simply in confirmation or declaratory of the common law. This, we think, is made clear upon examination of text writers of high authority, and by judicial decision of courts entitled to great weight in the determination of such a question; and if this provision of our Code be simply declaratory of the common law, as we suppose it to be, the same reason and principle equally apply to the case where the mortal blow or poison is given in any county in this State, and the party so stricken or poisoned shall, in consequence of the blow or poison, die out of the State, within the year and a day after the blow given or poison administered, as to the case provided for by the terms of the statute. In such case it is the law of Maryland that is violated, and not the law of the State where death may happen to occur. By the felonious act of the accused, not only is there a great personal wrong inflicted upon the party assaulted or mortally wounded while under the protection of the law of the State, but the peace and dignity of the State where the act is perpetrated is outraged; and, though death may not immediately follow, yet, if it does follow as the consequence of the felonious act within the year, the crime of murder is complete. In inflicting the mortal wound then and there the accused expends his active agency in producing the crime, no matter where the injured party may languish, or where he may die, if death ensues within the time and as a consequence of the stroke or poison given. The grade and characteristics of the crime are determined immediately that death ensues, and that result relates back to the original felonious wounding or poisoning. The giving the blow that caused the death constitutes the crime.

Lord Coke seems to have been responsible to a considerable extent for the maintenance of the doubt that was formerly entertained upon this subject. In 3 Inst., at page 48, founding his text on the preamble to St. 2 & 3 Edw. VI., he says: "And, before the making of St. 2 Edw. VI. if a man had been feloniously striken or poisoned in one county, and after had died in another county, no sufficient indictment could thereof have been taken in either of said counties, because, by the law of the realm, the jurors of one county could inquire of that which was done in another county. It is provided in that act that the indictment may be taken in that county where the death doth happen." The reason assigned for this passage from the Institutes can hardly be accepted as sound at this day, —that is, that the jurors of one county cannot inquire of that which is done in another county. But we have the authority of the great Sir Mathew Hale to the contrary of this doctrine of Coke. In 1 Hale, P. C. 426, the author says: "At common law, if a man had been striken in one county and died in another, it was doubtful whether he were indictable or triable in either, but the common opinion was that he might be indicted where the stroke was given, for the death is but a consequence, and might be found in another county;" and he cites for this the Year Books 9 Edw. IV. p. 48, and 7 Hen. VII. p. 8. And he then proceeds to say that, "if the party died in another county, the body was removed into the county where the stroke was given for the coroner to take an inquest *super visam corporis*." "But now," says the author, "by St. 2 & 3 Edw. VI. ch. 24, the justices or coroner of the county where the party died shall inquire and proceed as if the stroke had been in the same county where the party died;" thus showing that the common law was changed, by St. 2 & 3 Edw. VI., but that our statute of 1809 (chapter 138, § 17) is simply declaratory of the common law; and according to that law, and to what was plainly Sir Mathew Hale's conclusion from the history of the law, the crime in this case was committed where the fatal stroke was given, and the place of the consequent death was quite immaterial. The authority of the opinion of Lord Hale so plainly indicated in the passage from his work just quoted has been fully recognized by subsequent writers of high repute. Thus, in 2 Hawk. P. C. p. 120, § 13, the author says: "It is said by some that the death of one who died in one county of the wound given in another was not indictable at all at common law, because the offense was not complete in either county, and the jury could inquire only of what happened in their own county. But it hath been holden by others that, if the corpse were carried into the county where the stroke was given, the whole might be inquired of by a jury of the same county." And so in 1 East P. C. 361, that very learned and accurate writer says: "Where the stroke and death are in different counties, it was doubtful at common law whether the offender could be tried at all, the offense not being complete in either, though the more common opinion was that he might be indicted where the stroke was given, for that alone is the act of the party; and the death is but a consequence, and might be found, though in another county, and the body was removed into the county where the stroke was given." It is not necessary that we should cite other text writers upon this subject; those we have cited sufficiently indicating the State of the English common law in regard to the question here involved though expressed with the doubts formerly entertained by some.

The question, however, does not rest on the authority of text writers alone; judicial decisions are not wanting upon the subject. In the case of Rex v. Hargrave, 5 Car. & P. 170, tried before Mr. Justice Patteson in 1831, an indictment for

manslaughter charged that A gave the deceased divers mortal blows at P, in the county of M, and that the deceased languished and died at D, in the county of K, and that the prisoner was then and there aiding in the commission of the felony. Upon objection to the sufficiency of the indictment, the learned justice, in overruling the objection, said: "The giving of the blows which caused the death constituted the felony. The languishing alone, which is not any part of the offense, is laid in Kent. The indictment states that the prisoner was then and there present, aiding and abetting in the commission of the felony. That must, of course, apply to the parish of All Saints, where the blows, which constitute the felony, were given." And there are many cases in this country which hold that, upon the definition of murder, and the elements that enter into and constitute the crime, the place of the death is wholly immaterial in the prosecution of the offender except in those cases specially provided for by positive statute; in other words, that the giving of the mortal blow that caused the death constitutes the felony, and the removal of the corpse to the county in which the mortal stroke was inflicted is not required for any purpose connected with the jurisdiction of the court over the crime or the offender. And, without stating the facts of each case, wherein these principles have been considered and maintained, we may refer to the cases of Riley v. State, 9 Humph. 646; People v. Gill, 7 Cal. 637; Minnesota v. Gessert, 21 Minn. 369; State v. Bowen, 16 Kan. 476; Green v. State, 66 Ala. 40. In the very celebrated case of U. S. v. Guiteau, tried in the District of Columbia in 1881–82, and reported in 1 Mackey, 498, this question of jurisdiction was extensively dicussed by counsel, and elaborately considered by the court, The accused was indicted under section 5339, Rev. St. U. S., for the murder, by shooting in the District of Columbia, of the then president of the United States, James A. Garfield, who, after receiving the mortal wound, languished for more than two months, and died in the State of New Jersey, where he had been taken in the hope of relief. The contention there was on the part of the prisoner that the murder was committed only partly within the District of Columbia and partly within the State of New Jersey, and therefore there was no jurisdiction in the court in the District of Columbia to try and convict the prisoner for his crime. But this contention was overruled. It was first considered and overruled in the criminal court, in a very learned and able opinion by Mr. Justice Cox, before whom the case was tried; and, after conviction, the case was taken to a session in general term of the Supreme Court of the District, where the decision of the trial court was fully reviewed, and the conclusion of Mr. Justice Cox concurred in, though for reasons somewhat variant from those employed by the trial judge. In the opinion of Judge Cox, the common-law authorities sustained the jurisdiction but he was further of opinion that the statute of 2 Geo. II. ch. 21, was in force in Maryland at the date of the cession of the District by this State, and consequently was still in force in the district, and that that statute fully applied to the case; and, while the court of review, sitting in general term, agreed in the conclusion arrived at by Judge Cox, and also in the proposition that the common law was sufficient for the case, it held that, by the terms of the statute of the United States applicable to the District of Columbia, which provides that in all places or districts under the sole and exclusive jurisdiction of the United States, if a party shall commit the crime of murder, such person, on being convicted, shall suffer death, the party inflicting the mortal wound in the district is guilty of murder, though the death of the victim subsequently occurs, in consequence of the wound, in any of the States of the Union; that in such case, the crime of murder becomes complete in the district where the mortal wound was given, in the contemplation of the statute, irrespective of the place of the death; thus holding that the mortal stroke which caused the death constituted the felony, and that the place of death was immaterial to the jurisdiction of the court to try and convict the offender. But that was not all that occurred. After the conviction and review had at the general term an application was made to the late Mr. Justice Bradley of the Supreme Court of the United States for a *habeas corpus*, on the ground that the Criminal Court of the District of Columbia, had no jurisdiction of the offense, and therefore the conviction was void. But that learned justice upon consideration of the case concurred with the courts of the District of Columbia in holding that there was jurisdiction of the offense, and that the party had been properly tried, and therefore dismissed the petition. And thus ended that memorable case. Both upon reason and authority, therefore, this court is of opinion that the court below was entirely correct in overruling the demurrer to each and all of the counts of the indictment; and, as there is no cause assigned in support of the motion in arrest of judgment, that could be considered on such motion, the court was also correct in overruling that motion.

2. The second question presented is one of practice. It arose upon a motion by the prisoner to discharge the jury during the course of trial, because of alleged separation of the jury in the recess of the court. It appears that the entire panel of twelve were placed in charge of the sheriff during a recess of the court from 4 :30 P. M to 7 :30 P. M., and were taken to quarters provided at an hotel in the town. Upon reaching the hotel one of the jurors was suffering so much from illness that he had to be allowed to go to bed, but he was alone and was locked in the room by the sheriff. At the hour of reassembling of the court, the other eleven jurors were taken unto the court but in consequence of the inability of the sick juror to be present the court adjourned until 10 o'clock A. M. the next day, at which time the whole panel attended. It is not pretended or

suggested that the sick juror was approached by any one, or tampered with in any manner. The motion to discharge the panel was founded upon the simple fact that the sick juror had been separated from his fellow jurors before verdict rendered. In overruling this motion the court below certainly committed no error. In the trial of capital cases even there are many occasions when in reason, and a proper regard to the needs of humanity, it may become necessary to allow a a temporary separation of the jury, without necessarily breaking up the trial, and that, even after the jury have retired to consider of their verdict, otherwise protracted trials could seldom be brought to a final conclusion. Of course the separation should only be allowed when attended with those precautions and safeguards necessary to secure entire freedom from approach or external influence of any kind. Neal v. State, 64 Ga. 272; State v. Payton, 90 Mo. 220; Coleman v. State, 59 Miss. 484; State v. O'Brien, 7 R. I. 337; Goersen v. Com., 106 Penn. St. 477; People v. Bonney, 19 Cal. 426; 1 Bish. Crim. Proc., §§ 993, 994; 12 Am. & Eng. Enc. Law, 371. But each case rests upon its own peculiar circumstances, and is within the sound discretion of the trial court, and is therefore not the subject of appellate review, except where it is affirmatively shown that the party has been prejudiced by the action of the court.

It follows that the judgment below must be affirmed.

NOTE.—As stated in the principal case the difficulty in the common law, in cases where death occurred beyond the county where the felonious blow was struck or the poison administered, lay in the circumscribed powers of an English jury, the law not allowing that body where the death took place beyond the county to find the fact of death, which fact, but not the place where it happened, was an inherent essential element in the crime of murder. 1 Hale P. C. 425-6; East Crown Law, 361, Sec. 128; 1 Hawkins P. C. 94; King v. Hargrave, 5 C. & P. 170; Grosvenor v. Inhabitants of Lath, 12 East, 244. The doubt being founded in a mere technicality the statute of 2 and 3 Edward IV. was passed to set the doubt at rest, but unfortunately in the wording of the preamble confirmed the previously existing doubt, by reciting therein as an object of its passage the failure of justice through such extreme nicety. The statute, however, created no new felony, but merely removed the difficulty which was supposed to exist in the trial of murder where the stroke was in one county and the death in another. East, 1 Crown Law, 365, Sec. 130. It was not true that, prior to the passage of the statute, murder could not be sufficiently indicted and punished, under the common law, in any case where the blow was struck in one county and death followed in another. If the body was brought into the county where the blow was struck from the county where the death happened so that the jury might have *evidence* of the death, within their lawful cognizance, the crime might be tried in the county where the blow was struck. 6 Henry VII. 10. This practice shows first, that the obstacle in the way of an indictment was the limitation of the jury's power to find the fact of death and second, that the murder was committed in the county where the blow was struck. In 7 Henry VII. page 8 it was held, that an indictment which laid the blow in Middlesex and the death in Essex, was good because the striking was the principal act, and they who could take notice of the principal offense could take notice of the death, as accessory, though in another county. That the giving of the blow which caused the death constitutes the felony, as expressed in the above early decisions, is now accepted as the common law doctrine by the preponderance of English and American authorities. Rex v. Hargrave, 5 C. & P. 170; Riley v. State, 9 Humph. 646-56; State v. Gessert, 21 Minn. 369; State v. Bowen, 16 Kan. 475; State v. Carter, 3 Dutcher (27 N. J. Law), 499; State v. Kelly, 76 Me. 331; Green v. State, 66 Ala. 40; Grosvenor v. St. Augustine, 12 East, 244; Stout v. State, 25 Atl. Rep. (Md.) 299; People v. Gill, 6 Cal. 637; U. S. v. Guiteau, 1 Mackay (Dist. Col.), 498; Commonwealth v. Parker. 2 Pick. 550-9. In State v. McCoy, 8 Rob. Rep. 545, followed in 8 La. Ann. 290, the Supreme Court sustained the jurisdiction where the fatal blow was given within but death ensued without the State. They rested their decision however upon an act of the legislature of 1805 adopting the common law of England, which was construed as including a statute of 2 George II. upon this matter. The stroke alone is the act of the party and death is but a consequence. 1 East P. C. 361; 1 Hale P. C. 426. The true doctrine of law is that death is no part of a murder, which is wholly committed, in contemplation of law, at the time and place of the blow, although the death is not instantaneous but subsequent and elsewhere. 1 Bishop's Criminal Law, Sec. 112, p. 58. "An act to be criminal must be alleged to be against the sovereignty of the government. This is the very essence of the crime punishable by human law. How can an act done in one jurisdiction be an offense against the sovereignty of another?" State v. Carter, *supra*. In State v. Bowen, *supra*, Judge Brewer held, on objection that the information was insufficient, because it omitted to allege the death in the county where the indictment was found: "It seems to usreasonable to hold that as the only act which the defendant does towards causing the death is in giving the fatal blow, and the place where he does that is the place where *he commits the crime*, and that the subsequent wanderings of an injured party, uninfluenced by the defendant, do not give an ambulatory character to the crime; at least that these movements do not, unless under the express warrant of the statute, change the place of the offense and that while it may be true that the crime is not completed until death, yet that death simply determines the character of the crime committed in giving the blow and refers back and qualifies the blow." It cannot be disputed that within well established principles it is competent for legislation to to make punishable the whole of any offense whereof a material part was committed within its jurisdiction. But no State has authority to punish a foreign wrong. By the English statute, 9 George IV. Chap. 31, Sec. 8, "where any person, being feloniously stricken, poisoned or otherwise hurt upon the sea, or any other place out of England, etc., every offense committed in respect of every such case may be dealt with, etc., in the county or place, in England in which the death, etc., shall happen, in the same manner in all respects as if such offense had been wholly committed in that county and place." Under this statute although fully covering the case, it was held, where a person was beaten on an American ship, en route for New York, to Liverpool, and died in Liverpool of the beating, none of the parties being English, that the court would not assume jurisdiction, because

the English legislature had no right to make what was done by foreigners on board a foreign ship, a crime against English law. Rex v. Lewis, 7 Cox Criminal Cases, 277. In Michigan and Massachusetts statutes upon this question have been construed to confer jurisdiction when the death occurred within the county although the felonious blow was struck or the poison administered in another county. In Tyler v. People, 8 Mich., 320, it was held by a majority of the court, Justice Campbell dissenting, that where the mortal blew was inflicted on a river within a county in Canada, the murderer, though not appearing by the evidence to be a citizen of the State was indictable in Michigan. In Massachusetts it was held, where blows were inflicted on a seaman on a British ship by persons not resident of Massachusetts, where seaman died of injuries in Massachusetts the offender could be punished there. Com. v. Mcloon, 101 Mass. 1. These two latter cases are therefore contrary to what would appear to be the well established rule.

T. G. ROMBAUER.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION — Accounting — Negligence.—A ranch belonging to an administrator's intestate was leased to B for a year, and the cows were pastured during the winter on a farm belonging to the administrator, B agreeing to pay $300 therefor,—one-half to the administrator and one-half to his tenant. B failed to make the payment, and the administrator advanced to his tenant the amount due him for the pasturage: Held, that this amount should not have been allowed to the administrator as a credit in the settlement of his account.—IN RE MOORE'S ESTATE, Cal., 31 Pac. Rep. 584.

2. ADVERSE POSSESSION.—Open, exclusive, and continuous possession by a defendant railroad of a right of way for 14 years, without any permission or license from or contract with plaintiffs, is of itself sufficient evidence that such possession was adverse to plaintiff. —TURNER V. UNION PAC. RY. CO., Mo., 20 S. W. Rep. 673.

3. APPEAL—Dismissal.—When the record shows that an appeal has been taken more than six months previous to the opening of a term of this court, and the appellant has prepared no abstract or brief, nor taken any steps towards prosecuting the appeal, nor shown any good reason why he has not done so, the appeal will be dismissed, upon the respondent's bringing up the record and moving for that purpose.—HIMEBAUGH V. CROUCH, S. Dak., 53 N. W. Rep. 862.

4. APPEAL—Party not Affected —A sale of a decedent's estate for the benefit of the creditors will not be reviewed on appeal, at the instance of a creditor, because one of the heirs, against whose interest the sale was made, was not cited to appear at the proceedings of the sale.—MOORE V. BRADY, Miss., 11 South. Rep. 723.

5. ARBITRATION AND AWARD — Validity.—An arbitration and award are none the less binding because made pursuant to the regulations of a church to which the parties belong.—PAYNE V. CRAWFORD, Ala., 11 South. Rep. 725.

6. APPEAL BOND — Recovery against Principal.—An appellant from a judgment of a justice's court cannot complain that the circuit court rendered judgment against him in an amount exceeding the penalty of the appeal bond, where such judgment is authorized by the complaint, since the penalty in the bond is intended to limit the recovery against the sureties alone.—CASEY V. COKER, Ala., 11 South. Rep. 742.

7. BAIL—Application for Habeas Corpus.—Where resort to *habeas corpus* becomes necessary to admit a prisoner to bail, such application, under the statutes of Missouri, should first be made to the circuit judge for the county where the applicant is in custody.—STATE V. FIELD, Mo., 20 S. W. Rep. 672.

8. BILL OF EXCEPTIONS—Inability of Trial Judge to Settle.—Section 5086, Comp. Laws, providing that if a judge die, is removed from office, becomes disqualified, or removes from the State, before settling a bill of exceptions or statement in a case which he has tried, it shall be settled and certified in such manner as the supreme court may by its order or rules direct, was only intended to supply a manner in which a bill might be settled in a case in which otherwise none could be settled.—SEVERSON V. MILWAUKEE MECHANICS' MUT. INS. CO., S. Dak., 53 N. W. Rep. 860.

9. CARRIER—Bill of Lading—Interstate Commerce.—In an action brought in Missouri against a railroad company for the value of cotton destroyed *in transitu* by fire, it appeared that the bill of lading was made in Texas, and the cotton was shipped to Massachusetts. Defendant answered, setting up a provision in the bill of lading that "this company shall not be liable for loss or damage by fire," to which plaintiff pleaded in reply a statute of Texas, declaring void any limitation by carriers of their common-law liability, but it appeared that the statute did not apply to shipments to points without the State: Held, that it was error to refuse an instruction that the bill of lading, being a through one, should be construed by the laws of Missouri, as such instruction would be equivalent to disregarding the statute pleaded, and place defendant's liability solely under the common law, equally in force in both States. —OTIS CO. V. MISSOURI PAC. RY. CO., Mo., 20 S. W. Rep. 676.

10. CARRIERS OF PASSENGERS—Limitation of Liability. —A common carrier, which relies on a special contract exempting it from liability for the destruction by fire of goods delivered to it for transportation, must show, not only that the goods were so destroyed, but also that such destruction was not caused by any fault on its part; and the owner of the goods is entitled to recover where he shows that they were delivered to the carrier 16 and 40 hours before their destruction by a fire in its warehouse, and the carrier fails to show either that it could not have forwarded them by the use of reasonable diligence before the fire, or that it used reasonable care to guard against the fire.—LOUISVILLE & N. R. CO. V. TOUART, Ala., 11 South. Rep. 756.

11. CERTIORARI — Taxation.—A tax-payer may prosecute a writ of *certiorari* to review any municipal or official action, which tends to burden his taxing district with a debt.—STATE v. ROBBINS, N. J., 25 Atl. Rep. 471.

12. CHATTEL MORTGAGES—Priorities.—An unrecorded chattel mortgage is valid against a subsequent mortgagee, having his mortgage forthwith filed for record, if such subsequent mortgagee receives notice of the prior mortgage at any time before obtaining or accepting his lien on the personal property.—NEERMAN v. CALDWELL, Kan., 31 Pac. Rep. 608.

13. CHATTEL MORTGAGES—Recording.—How. St. § 6193, provides that every instrument intended as a mortgage of goods and chattels, which shall not be accompanied by an immediate delivery, and followed by an actual change of possession of the things mortgaged, shall be void as against creditors of the mortgagor, unless recorded, does not apply to a mortgage of accounts, as only mortgages of goods and chattels capable of delivery are within the meaning of such statute.—FARREL FOUNDRY & MACH. CO. v. PRESTON NAT. BANK OF DETROIT, Mich., 53 N. W. Rep. 836.

14. CONDITIONAL SALE—Right to Reclaim Property.—Plaintiff's intestate sold certain machinery, taking a note from the vendee under an agreement that, on default in payment, the vendor might reclaim the machinery and remove it, and, if any portion of the note should remain unpaid when possession should be so taken, then the amount which had been paid should be considered payment for the use of the machinery by the vendee, and the note should be canceled: Held, that the vendor could not adopt both remedies against the vendee, and that bringing an action on the note barred the right to reclaim the property.—CROMPTON v. BEACH, Conn., 25 Atl. Rep. 446.

15. CONSTITUTIONAL LAW — Interstate Commerce—Original Packages.—Acts N. C. 1891, ch. 331, providing that persons selling seed in packages unmarked by the date when such seed were grown, except farmers selling seed in open bulk to other farmers or gardeners, shall be guilty of a misdemeanor, is unconstitutional and void under the interstate commerce clause of the constitution (article 1, § 8, cl. 3), with respect to the selling of seed in the original packages imported from another State.—IN RE SANDERS, U. S. C. C. (N. Car.), 52 Fed. Rep. 802.

16. CONSTITUTIONAL LAW—Railroad Commission.—Acts 1891, ch. 320, establishing a railroad commission, and investing the same with authority to make reasonable regulations for the prevention of excessive charges and unjust discriminations by railroad companies, is constitutional, since the act does not confer on the commission power to pass a law, but power to make regulations reviewable by the court to carry into effect a law already passed.—ATLANTIC EXP. CO. v. WILMINGTON & W. R. CO., N. Car., 16 S. E. Rep. 393.

17. CONSTITUTIONAL LAW—Title of Act—Gaming.—An act entitled "An act to prevent and punish gaming" fairly embraces within its title a provision that any person losing on any of the games referred to therein may recover the loss from the person winning, such provision tending to prevent gaming by removing the object to be gained thereby.—MALING v. CRUMMEY, Wash., 31 Pac. Rep. 600.

18. CONTRACT—Abandonment.—In order to justify a party to a contract in abandoning further performance and suing for future profits, it is not sufficient that the other party has broken substantial provisions of the contract, and manifests an intention to continue such breaches, but it must also be shown that the breaches prevent the innocent party from executing the contract, or render its objects unattainable by proper performance.—LAKE SHORE & M. S. RY. CO. v. RICHARDS, Ill., 32 N. E. Rep. 402.

19. CONTRACT — Evidence.—Where, in an action to recover for violation of a contract to deliver at a cheese factory twice daily fresh, unadulterated milk, plaintiff offered several of defendant's employees to prove that the adulteration, was accomplished under direction of defendant's wife, by mixing in skimmed milk, he could not complain because defendant's wife was offered to disprove any such direction, since, by his own, offer, he admitted her agency for the husband.—RHYNER v. CARVER, Wis., 53 N. W. Rep. 849.

20. CONTRACT — Pleading — Consideration.—The consideration on which a contract, not in writing, is based, must be pleaded.—ACHESON v. WESTERN UNION TEL. CO., Cal., 31 Pac. Rep. 583.

21. CONTRACTS—Restraint of Trade.—A contract between several companies, under which it is agreed not to sell goods within certain territorial limits for a specified time, and that no company shall sell more than a certain per cent. of the whole amount sold by all the companies, is void, under Civil Code, §§ 1673-1675, the fact that such contract provides for the interchange of the use of certain patents owned by some of the companies does not take it out of the statute.—VULCAN POWDER CO. v. HERCULES POWDER CO., Cal., 31 Pac. Rep. 581.

22. CONTRACT — Services — Compensation.—In an action to recover for services rendered as nurse to an invalid aunt, an instruction that, if certain facts should be found, the jury might find an implied promise to pay, without stating that, if the facts were so found, plaintiff would be entitled to recover, but merely that "plaintiff was entitled to recover what the services were worth," although not critically accurate, was not misleading.—BOUIC v. MAUGHT, Md., 25 Atl. Rep. 423.

23. CONTRACT OF RENTING.—Defendant wrote plaintiff: "My brother F has some idea of renting your farm. If you and he can agree upon terms of third share as your rent, I will become the renter, and enter into contract with you, he to work the farm." To this was replied: "I would agree to terms of one-third rent, and would be at home to negotiate with F:" Held, that these letters were too indefinite as to terms to make a contract binding on defendant.—WILLS v. CARPENTER, Md., 25 Atl. Rep. 415.

24. CONTRACT MADE ON SUNDAY.—Where an agreement to sell land was made on Sunday, and part of the purchase money was paid on that day, and a receipt given therefor, the transactions are void.—NEIBERT v. BAGHURST, N. J., 25 Atl. Rep. 474.

25. COVENANTS—Warranty.—The words "grant, bargain, and sell" do not constitute a general covenant against incumbrances and for quiet enjoyment, but amount to a covenant only against acts done or suffered by the grantor and his heirs.—HEFLIN v. PHILLIPS, Ala., 11 South. Rep. 729.

26. CRIMINAL EVIDENCE—False Pretenses.—In a trial for attempting to obtain money by "the confidence game," where the evidence shows that defendant and two others, jointly indicted with him, operated together in conducting the game, the prosecution, for the purpose of showing intent, may introduce evidence of another similar transaction by the parties with a person other than the prosecuting witness, even though such person in his testimony calls the transaction robbery, and it differed in detail from the charge on trial, but constituted in fact the crime of obtaining money by "the confidence game."—STATE v. JACKSON, Mo., 20 S. W. Rep. 674.

27. CRIMINAL LAW—Appeal.—On a trial for conspiracy, where the declarations of defendant's co-conspirator are admitted, and no motion is subsequently made to strike it out, defendant cannot complain, unless such evidence is admitted over objection, which is reserved in a bill of exceptions.—HOWARD v. STATE, Tex., 20 S. W. Rep. 711.

28. CRIMINAL LAW—Appeal—Recognizance.—Since the court of appeals is, by the act of 1892, succeeded as to its criminal jurisdiction by the court of criminal appeals, a recognizance on appeal in a criminal case, binding the appellant "to abide the judgment of the court of appeals," is not a legal obligation, and the

appeal will, on motion, be dismissed.—CUMMINGS v. STATE, Tex., 20 S. W. Rep. 706.

29. CRIMINAL LAW—Disqualification of Juror.—A juror was shown, after convicting for murder, to have stated that he had seen too much of the difficulty at the time it occurred, and knew too much of the case, to render any other verdict; that he should have been a witness instead of a juror; and that a certain defense offered at the trial was, as he knew of his own personal knowledge, without merit. A counter affidavit was to the effect that he had no prejudice against defendant, that he had tried the case on the law and the evidence, and that he had not been controlled by any thing he had heard or seen prior to the trial. His first statements, however, were admitted, or, at least, not denied: Held, that a new trial should have been granted.—WASHBURN v. STATE, Tex., 20 S. W. Rep. 715.

30. CRIMINAL LAW—Instructions.—In a criminal prosecution, a request by defendant to charge that, "while the law seeks, to punish the guilty, and to check crime, it never attempts to check crime by punishing the innocent, or even the reasonably doubtful innocent," is properly refused, as likely to mislead.—SHELBY v. STATE, Ala., 11 South. Rep. 727.

31. CRIMINAL LAW—Murder.—On a trial of M and B under a joint indictment for murder, the dying declaration of the deceased that B shot him was offered in evidence. There was no further evidence to support the charge that B did the shooting, his co-defendant M testifying that she shot deceased, which testimony was supported by the evidence of her daughter and B: Held, that the evidence was insufficient to support a conviction of B for murder.—GREEN v. STATE, Tex., 20 S. W. Rep. 712.

32. CRIMINAL LAW—Perjury.—If the court have jurisdiction of the subject-matter of an action, and power to administer an oath to a witness therein, a false statement made by him under oath will constitute perjury, even though the jury in such action have not been properly sworn.—SMITH v. STATE, Tex., 20 S. W. Rep. 707.

33. CRIMINAL LAW—Record on Appeal.—A motion to reverse a judgment because the evidence does not support a conviction will not be entertained on appeal, where the record on appeal does not contain the evidence adduced on the trial.—JACKSON v. STATE, Tex., 20 S. W. Rep. 711.

34. CRIMINAL LAW—Venue.—Gen. St. § 1618, providing that every person charged with an offense shall be tried in the county wherein the offense was committed, except when "otherwise provided," means when otherwise provided by statute.—STATE v. MEEHAN, Conn., 25 Atl. Rep. 476.

35. CRIMINAL PRACTICE — Burglary.—An indictment charging that defendant feloniously, fraudulently, and burglariously, by force and threats, did break and enter a house with intent to commit theft, is good, though it fails to charge the entry as being made either in the day or night.—SAMPSON v. STATE, Tex., 20 S. W. Rep. 708.

36. CRIMINAL PRACTICE — Continuance.—An affidavit for a continuance in a criminal case alleged that, on the day after the commission of the crime, defendant was arrested and placed in jail, where he remained until the filing of his affidavit; that since the time of his arrest he had been without means to employ counsel or prepare his defense; and that he employed no counsel until the present term of court: Held, that the affidavit was insufficient, because it showed no change in defendant's financial condition whereby it was any easier to procure counsel on the return of the indictment than at the time of arrest.—SMITH v. STATE, Ind., 32 N. E. Rep. 807.

37. CRIMINAL PRACTICE — Indictment—Constitutional Law.—An information which, under Rev. St. 1881, § 1750, providing that it shall be sufficient in indictments and information to describe money, bank bills, notes, United States treasury notes, etc., "simply as money, without specifying any particular coin, note, bill, or currency," charges the larceny of "six dollars in money," is sufficient, under Const. art. 1, guarantying every one accused of crime the right "to demand the nature and cause of the accusation against him."—RANDALL v. STATE, Ind., 32 N. E. Rep. 305.

38. CRIMINAL PRACTICE—Indictment—Names of Witnesses.—It is not essential to the validity of an indictment that the names of the witnesses on whose evidence it is found be written at the foot of the indictment, since the statute requiring them to be so written is directory only.—SHELTON v. COMMONWEALTH, Va., 16 S. E. Rep. 355.

39. CRIMINAL PRACTICE — Malicious Mischief—Complaint.—A complaint charging that defendant "did willfully injure" a certain public building and house of worship, situated, etc., although in the language substantially of Gen. St. 1888, § 1423, is insufficient, in failing to show particularly the manner of the injury.—STATE v. COSTELLO, Conn., 25 Atl. Rep. 477.

40. DEATH BY WRONGFUL ACT—Receiver.—A receiver is not a "proprietor, owner, charterer, or hirer" within the meaning of Rev. St. art. 2899, giving a right of action for injuries resulting in death caused by the negligence of the proprietor, owner, charterer, or hirer of a railroad, etc., or by the negligence of their servants or agents.—BONNER v. THOMAS, Tex., 20 S. W. Rep. 722.

41. DEED — Acknowledgments — Requisites. — Four essential facts must substantially appear in the certificate of acknowledgment, viz: (1) That the person making the acknowledgment personally appeared before the officer who makes the certificate; (2) that there was an acknowledgment; (3) that the person who makes the acknowledgment is identified as the one executing the instrument; and (4) that such identity was either personally known or proved to the officer taking the acknowledgment.—CANNON v. DEMING, S. Dak., 53 N. W. Rep. 863.

42. DEED — Public Park.—Independently of, but immediately following, the description of the conveyed premises in a deed containing, without any exceptions, the usual covenants of warranty, in which deed the grantee was a municipal corporation, its successors and assigns, and the expressed consideration a nominal sum, was this clause: "Said tract of land hereby conveyed to be forever held and used as a public park." The purpose of the conveyance was not stated elsewhere: Held, that upon the face of the instrument the municipality did not acquire an absolute title in fee to the premises.—FLATEN v. CITY OF MOORHEAD, Minn., 53 N. W. Rep. 807.

43. DEED OF TRUST—Foreclosure Sale.—Where a deed of trust provides that a sale thereunder shall be made after first advertising in a newspaper "for five days," a Sunday intervening between the first and last insertion of the notice is to be reckoned as one the five days prescribed.—BOWLES v. BRAUER, Va., 16 S. E. Rep. 356.

44. DEED OF TRUST—Sales.—Deeds of trust given to secure notes provided that the sales thereunder should be made "at the courthouse door in the city of Carthage, Jasper county, Missouri," and they were advertised to take place there. At the time of the sale, court was in session in the second story of the building, and the door to the court room was reached by an open stairway, running from the street to a platform in front of the door, over which had been erected a vestibule, with an opening at the head of the stairway, looking down the same on the street, and at this opening the sale was made: Held, that the sale was made at the place required in the trust deed.—MALONEY v. WEBB, Mo., 20 S. W. Rep. 683.

45. DESCENT—Personalty.—In a proceeding in equity by the heirs of a decedent to recover a dwelling house, the petition contained the averments that the lot on which the house in question stood was the property of defendant, and the house was the property of plaintiff's decedent, which at her death passed to them as her heirs: Held, that by these averments the house is personal property, which passes to the administrator

of plaintiff's decedent, who alone has the right of action.—BROWN V. TURNER, Mo., 20 S. W. Rep. 660.

46. DESCENT AND DISTRIBUTION—Children—Will.—Testator, having been twice married, and leaving surviving him children by both wives left a will devising his farm to his second wife during her life, with remainder to her children begotton by him, there being no other mention in the will of his children: Held, that testator died intestate as to the children of his first wife, who were entitled to share in the farm after the expiration of the widow's life estate the statute of wills of 1855, § 10 (Rev. St. 1889, § 8877), providing that every testator shall be deemed to die intestate as to children or their descendants not named or provided for in the will, who shall be entitled to such portion of testator's estate as if he had died intestate.—THOMAS V. BLACK, Mo., 20 S. W. Rep. 657.

47. DESCENT AND DISTRIBUTION—Set-off.—The share of a distributee, who, as administrator, is indebted to the estate, does not pass to the trustee of the insolvent distributee, but is applied to the debt of the distributee to the estate.—GOSNELL V. FLACK, Md., 25 Atl. Rep. 411.

48. DIVORCE—Cruel Treatment.—The refusal of a husband to have sexual intercourse with his wife does not constitute "cruel and inhuman treatment," and is not sufficient grounds for a divorce a *vinculo*.—SCHOESSOW V. SCHOESSOW, Wis., 53 N. W. Rep. 856.

49. DOMICILE OF MINORS.—The law fixes the domicile of minors and attaches it to the domicile of their father or mother or tutor, and in case of the death of these to the place of their last domicile.—SUCCESSION OF VENNARD, La., 11 South. Rep. 705.

50. ELECTIONS—Secretary of State.—The duties of the secretary of State in promulgating the returns of the election are purely and exclusively ministerial under the election laws of this State.—STATE V. MASON, La., 11 South. Rep. 711.

51. EMINENT DOMAIN—Railroad in Street.—The construction and operation of a railroad at grade in a public street under municipal authority is not a new public use of the street, for which compensation may be demanded by abutting owners, as in the case of property "taken or damaged," within the meaning of article 2, § 21, of the constitution.—HENRY GAUSS & SONS MANUF'G CO. V. ST. LOUIS, K. & N. W. RY. CO., Mo., 20 S. W. Rep. 658.

52. EQUITY — Disputed Boundaries.—Act 1887, giving to courts of equity jurisdiction to try cases where a dispute exists between owners of adjoining lands concerning the boundaries thereof, confers on such courts authority to ascertain the true boundary lines between the adjacent estates which have become confused or uncertain, but such authority cannot be extended to the determination of title.—KING V. BRIGHAM, Oreg., 31 Pac. Rep. 601.

53. EVIDENCE — Original Entries—Experts.—Where a figure in an entry made in a bank pass book is very obscure, and difficult to decipher, the true meaning of such figure is a question of fact to be passed on by the jury. In such a case it is proper to allow expert witnesses to give their opinion as to its meaning.—KUX V. CENTRAL MICHIGAN SAV. BANK, Mich., 53 N. W. Rep. 828.

54. EVIDENCE — Refreshing Memory.—Schedules of prices fixed by dealers from year to year, which prices are the established prices in the trade, may be used by witnesses called to state the fair retail price of goods sold, it being shown that it was impossible for any one to carry the prices of all the articles in his mind.—NELSON V. COLUMBIAN IRON WORKS & DRY DOCK CO. OF BALTIMORE CITY, Md., 25 Atl. Rep. 417.

55. EXPERT TESTIMONY—Real Estate Agent.—An ordinary real estate agent is not competent to give his opinion as evidence upon the value of the private title in a strip of land lying in a public highway, and separated by the street from private property.—LAING V. UNITED NEW JERSEY RAILROAD & CANAL CO., N. J., 25 Atl. Rep. 409.

56. FEDERAL COURTS—Jurisdiction—Diverse Citizenship.—Under Act Aug. 13, 1888, § 1, providing that, "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either plaintiff or defendant," the circuit court for the southern district of California has no jurisdiction of such a suit by a Missouri corporation against an Illinois corporation, although the latter was organized for the purpose of doing business in the southern district of California, and has its principal office there.—ST. LOUIS R. CO. V. PACIFIC RY. CO., U. S. C. C. (Cal.), 52 Fed. Rep. 770.

57. FRAUDULENT CONVEYANCE.—A deed conveying a stock of merchandise to a person in trust to sell the same, and apply the proceeds as realized on certain debts, is not fraudulent *per se* as against other creditors of the grantor, where it contains no provision reserving any benefit or advantage to the grantor at the expense of the creditors, and has no defects rendering it inoperative as a conveyance, and is not in violation of the assignment law.—SIMON V. ASH, Tex., 20 S. W. Rep. 719.

58. FRAUDULENT CONVEYANCES—Burden of Proof.—In an action by one creditor of an insolvent debtor to set aside as fraudulent a conveyance by the debtor to another creditor in extinguishment of his debt, the burden is on the grantee to establish the justness and amount of the indebtedness and the adequacy of the consideration.—PAGE V. FRANCIS, Ala., 11 South. Rep. 737.

59. FRAUDULENT CONVEYANCES—Chattel Mortgage—Possession.—A recorded mortgage, covering both real and personal property, is not invalidated as to the personalty by the fact that the mortgagor is to retain possession of such property until default, since the recording of the mortgage, as permitted by statute, must be regarded as a substitute for change of possession.—COOPER V. BERNEY NAT. BANK, Ala., 11 South. Rep. 760.

60. GIFTS INTER VIVOS—Certificate of Deposit.—A son who, after his father's death, asserts a gift to himself of a certificate of deposit issued to the father during his life-time for money deposited by him, has the burden of showing that the father parted with the right and title to the certificate.—WHEELER V. GLASGOW, Ala., 11 South. Rep. 758.

61. GUARDIAN AND WARD—Accounting.—A settlement by a guardian with her ward will be set aside and an accounting ordered, whether the latter was of age when the same was made or not, where it appears that the guardian was indebted to the ward for about five times the sum accepted as full payment.—FOWLKS V. LOMBARD, Miss., 11 South. Rep. 724.

62. HABEAS CORPUS—Constitutional Law.—Const. art. 4, § 14, provides that the jurisdiction of the "court of appeals shall be co-extensive with the limits of the State, and such as now is or may hereafter be prescribed by law:" Held, where the court had at the adoption of the constitution appellate jurisdiction only, that the constitution gave the legislature no power to confer original jurisdiction in *habeas corpus* cases.—SEVINSKEY V. WAGENS, Md., 25 Atl. Rep. 468.

63. HABEAS CORPUS—Presumptions.— Where a man has been indicted, tried, convicted, and sentenced by a State court having jurisdiction of the prisoner and the crime charged, and authority to pronounce the particular sentence, it will be conclusively presumed, in *habeas corpus* proceedings in a federal court, that the State adduced sufficient evidence to sustain the judgment.—IN RE HASKELL, U. S. C. C. (Ohio), 52 Fed. Rep. 795.

64. HABEAS CORPUS—State Courts.—The action of a State court in refusing to assign counsel for a prisoner's defense, in forcing him to trial without time for preparation and without opportunity to secure, by compulsory process, the presence of material witnesses, in violation of the constitution and laws of the State, cannot be considered by a federal court in *habeas corpus* proceedings, brought on the ground that the prisoner is denied the equal protection of the laws,

and deprived of liberty with due process of law in violation of the fourteenth amendment.—IN RE KNIGHT, U. S. C. C. (Ohio), 52 Fed. Rep. 799.

65. HIGHWAY—Prescription.—The unlawful construction and maintenance of a canal in a street is a nuisance and will not cut off, by prescription, the right of an abutting lot owner to claim the fee to the center of the street after such canal has been abandoned and filled up.—TAYLOR V. CHICAGO M. & ST. P. RY. CO., Wis., 53 N. W. Rep. 853.

66. HOMESTEAD—Widow and Children.—Rev. St. § 2693 provides that, if any head of a family shall die leaving a widow or any minor children, his homestead shall vest in them, and continue for their benefit, without being subject to the payment of the debts of deceased, until the youngest child shall attain its legal majority, and until the death of the widow: Held, that the rights of the widow and children do not depend on their continued residence on the property, and the widow does not abandon her homestead estate by making a second marriage, and taking up a permanent residence with her husband at his home in another county, and neither are the rights of the children prejudiced by such marriage and removal of the widow.—HUFSCHMIDT V. GROSS, Mo., 20 S. W. Rep. 679.

67. INSURANCE — Conditions — Waiver. — Where the agent of defendant insurance company, clothed with full power to issue policies, and who was also the legal advisor of plaintiff, and knew the condition of her property, procured and assented to the placing of a chattel mortgage on the property, but did not indorse such assent on policy, the defendant insurance company is estopped from denying its liability under the policy; it being presumed to have the knowledge of its agent, even though the policy contained a provision that it would be void if the property became incumbered by a chattel mortgage, unless assent was indorsed thereon, and the further provision that no agent had power to waive a provision or condition.—BEEBE V. OHIO FARMERS' INS. CO., Mich., 53 N. W. Rep. 818.

68. INSURANCE—Conditions of Policy.—In an action on an insurance policy, a plea which alleges that, in a violation of a provision of the policy, there was at the time the policy was issued another policy on the property in favor of a certain person, but which does not show that such person had an insurable interest in the property, or that plaintiff was in any way a beneficiary under such prior policy, is demurrable.—COPELAND V. PHOENIX INS. CO., Ala., 11 South. Rep. 746.

69. INTOXICATING LIQUOR—Complaint.—A complaint made before a justice of the peace having jurisdiction thereof, within the city where the offense is alleged to have been committed, is not void because the name of the county is omitted.—PEOPLE V. KAHLER, Mich., 53 N. W. Rep. 826.

70. INTOXICATING LIQUORS—Sale to Minors.—To make a licensed seller of liquors liable under section 16, ch. 32, Code 1887, for selling to a minor, it is not necessary to aver in the indictment that he knew, or had reason to believe, the person to be a minor.—STATE V. BEAR, W. Va., 16 S. E. Rep. 368.

71. JUDGMENT—Limitations.—An action on a judgment may be maintained, though the time has not expired in which, at common law, an execution could issue to enforce it.—FIELD V. SIMS, Ala., 11 South. Rep. 763.

72. JUDGMENT—Limitation of Actions.—The revival of a justice's judgment by *scire facias* does not entitle the judgment creditor to sue thereon after the expiration of six years of its rendition, since the order of revival merely confers on the judgment creditor the statutory right to issue executions on the judgment after it has become dormant for that purpose, and does not enlarge his common-law right to sue thereon.—MARX V. SANDERS, Ala., 11 South. Rep. 764.

73. JUDGMENT BY DEFAULT.—Where defendant miscalculated the time for appearance owing to his forgetting that there were 29 days in February of that year, and for the last week of the time allowed he was busily engaged as witness and advisory counsel in a case in another county, and he arranged for appearance within the proper time as he had calculated it, it was not an abuse of discretion to vacate a judgment against him by default on the ground of excusable neglect.—JENSEN V. BARBOUR, Mont., 31 Pac. Rep. 592.

74. JUDICIAL SALES—Commissioners.—Where a decree directing the sale of a debtor's real estate by three commissioners provides that the commissioners giving the bond might sell alone a sale by two commissioners one of whom gave the bond, is valid.—STRAYER V. LONG EX'R, Va., 16 S. E. Rep. 357.

75. JUDICIAL SALE—Infant Heirs.—An order of the probate court for the sale of land to pay the debts of the deceased owner is not conclusive on the infant heirs of the decedent in an action brought by them against the purchaser to recover the land, where the order of sale does not show that such infants, by their guardian *ad litem* or attorney, consented to the sale.—GARDNER V. CHEATHAM, S. Car., 16 S. E. Rep. 368.

76. JUDGMENT—Action on Joint Contract.—The common-law rule that in an action on a joint contract against joint debtors the plaintiff could not recover separate judgments against each defendant has been changed by Code, art. 50, § 12, providing that in actions on joint contracts against joint debtors the plaintiff shall be entitled to judgment, as in actions *ex delicto*, against such one or more of the defendants as shall be shown by the evidence to be indebted to him.—WESTHEIMER V. CRAIG, Md., 25 Atl. Rep. 419.

77. JUSTICE OF THE PEACE—Appeal Bond—Mandamus.—Where an appeal bond tendered and filed with a justice of the peace is sufficient, it is his duty to accept and approve it, and *mandamus* will lie to compel him to perform such duty.—COATS V. STATE, Ind., 32 N. E. Rep. 737.

78 LANDLORD AND TENANT—Use and Occupation.—K leased a storeroom, in which was placed merchandise that was under mortgage. During the lease, the mortgagees, under an arrangement with K, placed an agent in the store to receive the cash from the sales, and apply it on their indebtedness, K being permitted to draw out a stated sum for personal and current expenses: Held, in an action by the lessor against the mortgagees to recover rent for the room while their agent was there, that they are not liable, in the absence of an express agreement to pay.—FISHER V. PFORZHEIMER, Mich., 53 N. W. Rep. 828.

79. LANDLORD AND TENANT—Willfully Cutting Trees—Action for Penalty—Debt.—A landlord who is not in possession of the demised premises, and who is not entitled to such possession, cannot maintain trespass against his tenant to recover the penalty imposed by Code, § 3296, for willfully and knowingly cutting trees without the consent of the owner of the land, as the gist of an action of trespass is the injury done to the possession.—ROGERS V. BROOKS, Ala., 11 South. Rep. 753.

80. LIBEL—Pleading.—A declaration for libel alleged that the defendant falsely and maliciously printed and published concerning plaintiff a certain false and defamatory libel in the words and figures set forth, but did not aver that it was simply repeated by defendant: Held, on demurrer, where such publication purported to be a report of what was said at a public meeting of the common council, that the court could not assume that it was such report, or that it was a correct report, so as to make the words privileged, and that the complaint was good.—BOEHMER V. DETROIT FREE PRESS CO., Mich., 53 N. W. Rep. 822.

81. LIMITATION OF ACTIONS—Construction of Statute.—Act Ind. April 7, 1881, provides that actions must be brought within the times named, as follows: "Upon promissory notes, bills of exchange, and other contracts for the payment of money, hereafter executed, within ten years: provided, that all such contracts as

have been heretofore executed may be enforced, under this act, within such time only as they have to run before being barred under the existing law," etc.: Held, the words "existing law," apply to laws existing when the contract was made, and not when the suit was brought; and therefore contracts executed prior to the act are still enforceable within 20 years, as before.—MCKEAN V. ARCHER, U. S. C. C. (Ind.), 52 Fed. Rep. 791.

82. MANDAMUS TO DISTRICT JUDGE.—The supreme court will not order the execution of a writ in disregard of an injunction, or interfere by *mandamus* with the action of a district judge, granting an order of injunction on grounds of a date subsequent to the rendition of the judgment enjoined, and presenting questions against proceedings under the writ enjoined.—STATE V. WEBRE, La., 11 South. Rep. 706.

83. MANDAMUS TO JUDICIAL OFFICERS.—The commissioners' court, after it has canvassed the returns and declared the election of a county officer, and the county judge has issued to him a certificate of his election, cannot be compelled by *mandamus* to act at the same term on his bond, instead of at a subsequent day which it has fixed upon for assembling and considering the bonds of all the county officers, though there may be no reason for the delay, since the statute fixes no time in which the bonds shall be approved, and the court has a discretion as to when it shall meet and perform its duties —LUCKEY V. SHORT, Tex., 20 S. W. Rep. 728.

84. MARINE INSURANCE—"Absolute total Loss."—Under a marine policy insuring against "absolute total loss only," a partial loss cannot be converted into a constructive total loss, and evidence of abandonment is immaterial.—MONROE V. BRITISH & FOREIGN MARINE INS. CO., LIMITED, U. S. C. C. of App., 52 Fed. Rep. 777.

85. MASTER AND SERVANT—Assumption of Risk.—Upon the facts held, that plaintiff assumed the ordinary risks of the employment, and therefore, since he was exposed to no extra hazard, nor set at work which he had not sought and engaged to do, and since the injury was caused by a danger that was apparent, and which required no special training to foresee, he could not recover.—DYSINGER V. CINCINNATI S. & M. RY. CO., Mich., 53 N. W. Rep. 825.

86. MASTER AND SERVANT — Negligence — Defective Elevator.—Where an elevator in a factory or warehouse is intended to be used only for carrying goods and materials from one part of the building to another, and employees of the establishment, familiar with the elevator's operation and the purpose of its construction, ride on it, under a mere implied license, for their own pleasure and convenience, they accept any risk incident to its construction and operation, and can only require of their employer ordinary care to avoid accident; but, if the employees are authorized or directed to use the elevator for personal transportation, the employer is bound to render it as free from danger as careful foresight and precaution may reasonably dictate.—WISE V. ACKERMAN, Md., 25 Atl. Rep. 424.

87. MASTER AND SERVANT.—A servant employed in operating a ripsaw notified the master of a defect, and refused to work until it was repaired. The master afterwards reported the repairs to have been made. The servant then went to work, and was injured by the same defect; the testimony tending to show that it was no longer apparent: Held, that the direction of a verdict for the master was improper, and that the servant was entitled to have submitted whether the defect would have been apparent to one of ordinary care, since, if not so apparent, he was right in relying on what was told him about the repairs, and was not bound to examine for himself.—LAWRENCE V. C. C. HAGEMEYER & CO., Ky., 20 S. W. Rep. 704.

88. MASTER AND SERVANT — Defective Machinery.—Knowledge by a master of the defective condition of machinery does not make him liable for injuries resulting therefrom to one of his servants, unless he had a reasonable opportunity after acquiring such knowledge, to remedy the defect.—SEABORD MANUF'G CO. V. WOODSON, Ala., 11 South. Rep. 733.

89. MASTER AND SERVANT—Fellow-servants.—A member of one "section gang' and the "boss" of another "section gang," employed by the same railroad company, are fellow servants.—CLARKE V. PENNSYLVANIA CO., Ind., 32 N. E. Rep. 808.

90. MASTER AND SERVANT—Negligence.—Under Const. § 193, providing that knowledge by an employee of a railroad company of the defective condition of machinery shall be no defense to an action for injuries caused by such defect, except as to conductors or engineers in charge and voluntarily operating it, where a switchman injured by a defective footboard on the engine testified that he knew the board had been defective, but believed it had been repaired, it was for the jury to determine whether he was guilty of such willful negligence in using it as to prevent his recovery. —WELCH V. ALABAMA & V. RY. CO., Miss., 11 South. Rep. 723.

91. MECHANIC'S LIEN—Contract Price.—Rev. St. § 3315, as amended by Laws 1885, ch. 312, after giving a lien to any subcontractor, provided that (1) a subcontractor's claim shall not constitute a lien, except to the extent of the owner's indebtedness at the time of notice or thereafter, to the principal contractor; (2) in no case shall the owner be compelled to pay a greater sum "than the price or sum stipulated in the original contract." Laws 1887, ch. 535, retains all the essential provisions of section 3315, above, except the first restriction: Held, that the term, "the price or sum stipulated in the original contract," as used in the act of 1887, does not mean the price stipulated for a full performance of the contract by the principal contractor, unless he fully performed the same, and, in case of partial non-performance, it means the proportionate contract price for the part performed, and restricts the subcontractor's lien to the unpaid balance of that sum.—WRIGHT V. POHLS, Wis., 53 N. W. Rep. 848.

92. MONEY COLLECTED ON SUNDAY.—Where money is received by a treasurer of a club for sales made and work done in violation of the Sunday laws and the charter of the club, and a promise is made on a week day to pay the money to the corporation, a recovery may be had in assumpsit.—HAACKE V. KNIGHTS OF LIBERTY SOCIAL & LITERARY CLUB, Md., 25 Atl. Rep. 422.

93. MORTGAGE — Foreclosure—Assignment.—Prior to an action to foreclose a mortgage, plaintiff assigned half of the mortgage and note which it secured to defendant, the mortgagor, and executed to him a power of attorney "to take all lawful ways and means for the recovery of the sum or sums of money now due and owing or hereafter to become due and owing upon said note and mortgage, and, in case of payment, to give acquittal or other sufficient discharge, as fully as I might or could do if these presents were not made." Defendant soon afterwards executed and acknowledged a release of such mortgage without the knowledge of plaintiff, or without having paid him any part thereof: Held, that this release was unauthorized, and does not relieve any portion of the mortgaged property from the incumbrance.—MCINTIRE V. CONRAD, Mich., 53 N. W. Rep. 829.

94. MORTGAGE—Foreclosure—Personal Judgment —A complaint in foreclosure alleged conveyance of the mortgaged premises to defendant, subject to the mortgage, but without anything further tending to show personal liability. The prayer, however, included a demand for personal judgment, and this was specified also in the summons: Held, that a judgment finding defendant personally liable, though erroneous, was not void, and could be corrected only on appeal or motion, within the time limited by Code Civil Proc. § 473.—BLONDEAU V. SNYDER, Cal., 31 Pac. Rep. 591.

95. MORTGAGE—Foreclosure Sale.—Where the holder of two notes secured by a single mortgage forecloses on only one of them, the other not being due, purchasers at the foreclosure sale take the lands free of any lien for the note not foreclosed on.—VIENO V. GIBSON, Tex., 20 S. W. Rep. 717.

96. MUNICIPAL CORPORATION—Ordinance—Markets.—A city ordinance which declares that it shall thereafter not be lawful for any one to set up or establish a private market for the sale of meats, fish, vegetables, etc., without permission of the city council, is illegal and void, because the discretion vested by such an ordinance in the city council is in no way regulated or controlled, and prescribes no condition upon which permission shall be granted, leaving it within the power of the city council to grant or refuse the privilege at pleasure.—STATE v. DUBARRY, La., 11 South. Rep. 718.

97. MUNICIPAL CORPORATION—Public Improvements—Assessments.—Where a city has condemned property for the purpose of opening a street, awarded damages therefor, and assessed the benefits on the various property holders, the question whether the city had acquired title to the property sought to be condemned by dedication or relinquishment from the owners thereof before the condemnation proceedings were initiated is triable only in the proceedings to condemn, and cannot be raised in suits to enforce the tax bills, nor in a collateral suit by the owners of the property assessed to enjoin collection of the tax.—MICHAEL v. CITY OF ST. LOUIS, Mo., 20 S. W. Rep. 666.

98. NEGOTIABLE INSTRUMENT — Attorney's Fees.—In an action on a note providing for attorney's fees, but not stating any amount, the value of the attorneys' services, though not averred, may be proved, but no recovery had beyond the amount claimed.—LINDLEY v. SULLIVAN, Ind., 32 N. E. Rep. 788.

99. NEGOTIABLE INSTRUMENT—Parol Evidence.—The maker of a draft cannot show, in an action against him by the payee after refusal of payment by the drawee, that it was understood at the time the draft was given that the maker should not be liable thereon, but that the payee should look wholly to the drawee for payment.—TODD v. ROBERTS, Tex., 20 S. W. Rep. 722.

100. PARTITION.—A deed executed by an ancestor in his lifetime conveying land to some of his heirs does not deprive complainants, his other heirs, of the right to have the land partitioned after his death, where the deed was never delivered and accepted, and the ancestor remained in possession as owner for more than 10 years after its execution, and until the time of his death.—GORE v. DICKINSON, Ala., 11 South. Rep. 743.

101. PARTNERSHIP—Right to Salary.—The rule that a partner is not entitled to compensation for services rendered the firm does not apply where there is an agreement for such compensation, either express or fairly implied from the action of the partners, or from their course of dealing with each other in connection with the business, or from circumstances under which extra services are rendered by a partner, for which compensation is claimed.—ADAMS v. WARREN, Ala., 11 South. Rep. 754.

102. PLEADING—Counterclaim.—Plaintiff sued for the amount due for threshing defendant's grain. Defendant answered by a counterclaim, alleging that the engine was defective and out of repair; that plaintiff, in removing it from defendant's premises as soon as the threshing was done, unnecessarily drove and directed it close to the new stacks of straw, where he negligently stopped and started it, thereby causing it to emit an additional amount of fire, which was communicated to the stacks, totally destroying them, together with a large amount of defendant's other property: Held, that the counterclaim stated "a cause of action arising out of the contract as the foundation of plaintiff's claim."—MCGREGOR v. AULD, Wis., 53 N. W. Rep. 845.

103. PRINCIPAL AND AGENT—Usage and Custom.—The rule that, when an agency is created by a written instrument, the extent of the agent's authority must be ascertained from the instrument itself, is not violated by parol evidence of the custom and usage of the trade or business for the purpose of showing the authority of a commercial agent, whose authority was not limited by the instrument appointing him, as the evidence does not enlarge, but interprets, the powers given him.—CAWTHORN v. LUSK, Ala., 11 South. Rep. 731.

104. RAILROAD COMPANIES—Contributory Negligence.—Plaintiff attempted to cross a railroad track, and was standing on a side track, waiting for a train to pass on the main track. While thus waiting, he was struck by a train on the side track. If plaintiff had looked, he could have seen the train which injured him, when it was a quarter of a mile away: Held, that plaintiff could not recover, though no signal was given by the approaching train.—MAXEY v. MISSOURI PAC. RY. CO., Mo., 20 S. W. Rep. 654.

105. RAILROAD COMPANIES — Killing Stock — Fences and Cattle Guards—Evidence of Damage—Amendment of Verdict.—The statute providing that every railroad company shall provide suitable connecting fences and cattle guards at all highways, sufficient to keep stock from passing on the railroad contemplates that railway tracks shall only be exposed within the limits of the highway, and where a company, by constructing its guards at a distance from the line of the highway, thus exposes its tracts, and increases the danger, it renders itself liable for damage occasioned thereby.—PARKER v. LAKE SHORE & M. S. RY. CO., Mich., 53 N. W. Rep. 834.

106. RAILROAD COMPANIES—Negligence—Trespassing Animals.—Persons in charge of a train running on a track which is properly fenced are not bound to exercise care to discover the presence on the track of trespassing animals, of whose approach they have no notice.—ILLINOIS CENT. R. CO. v. NOBLE, Ill., 32 N. E. Rep. 684.

107. REMOVAL OF CAUSES—Separable Controversy.—An action for wrongful arrest and imprisonment and for malicious prosecution, instituted in a State court against two defendants jointly, cannot be removed by either into the federal court, under Act March 3, 1875, § 2, upon the ground of a separate controversy; and the fact that the defendant seeking removal has filed separate defenses does not make such cause of action separable.—O'HARROW v. HENDERSON, U. S. C. C. (Ind.), 52 Fed. Rep. 769.

108. REPLEVIN BOND.—The mere fact that a replevin bond may be a good statutory bond, which might be enforced in a summary method provided by statute, does not render it incapable of enforcement by suit as a common-law obligation. — BULLOCK v. TRAWEEK, Tex., 20 S. W. Rep. 724.

109. SALE—When title Passes.—Where logs, sold on contract for delivery at a specified place, were not cut when the contract was made, the title thereto does not pass until after delivery, and a mortgagee thereof before delivery will hold the same as against such purchaser.—NORTH PAC. LUMBERING & MANUF'G CO. v. KERRON, Wash., 31 Pac. Rep. 595.

110. SALE OF FERTILIZERS—Non-residents.—A sale of commercial fertilizers is void if the seller has not been licensed, or if the fertilizer is not tagged, as required by Code, §§ 139-141; and it is immaterial that the seller is a nonresident, or that the fertilizer was manufactured in another State, when the sale was made within the State, as the statute makes no discrimination against residents or products of other States. — MERRIMAN v. KNOX, Ala., 11 South. Rep. 741.

111. SPECIFIC PERFORMANCE.— In proceedings under Act No. 133 of 1888, to enforce the performance of a contract therein named, the contract must be so fixed in terms, and the liability of the defendant so certain, and the duty to be performed so particularized, that the duty imposed upon the defendant by the court in decreeing the execution of the contract can be readily ascertained and as readily executed.—STATE v. NEW ORLEANS & C. R. CO., La., 11 South. Rep. 709.

112. TAXATION—License of Vessels — Uniformity.—A St. Louis ordinance provides that a reduction of 40 per cent. from the rates of license shall be allowed to vessels owned by residents of St. Louis, and returned and assessed for taxation there within a prescribed time:

Held, where defendant, a foreign corporation, had its principal office in St. Louis, where it registered its boats under the national registry laws, and returned and listed them for taxation in compliance with the city ordinance, and paid the taxes thereon, that the city was estopped, while it retained such tax, from denying the validity thereof, and that defendant was entitled to the 40 per cent. reduction on its license.—CITY OF ST. LOUIS V. CONSOLIDATED COAL CO., Mo., 20 S. W. Rep 699.

113. TAXATION—Money in Bank.—Although a deposit in bank subject to the sight check of the depositor is usually held to be only a debt against the bank, it is regarded by the laws of Texas providing for the rendition of property for taxation as cash, and as such is not subject to be set off for the purpose of taxation by the liabilities of the depositor.—CAMPBELL V. WIGGINS, Tex., 20 S. W. Rep. 730.

114. TAX TITLE—Redemption by Mortgagee.—Where one claiming under a tax sale is not made a party to proceedings to foreclose a mortgage made previous to the levy of the taxes for which the sale was made, he is not affected by a decree foreclosing the mortgage, or by a sale and conveyance thereunder.—CHARD V. HOYT, N. Y., 32 N. E. Rep. 740.

115. TRESPASS TO TRY TITLE—Evidence.—An instrument signed by T, the record owner of land, and duly recorded, which recites that W is a joint and equal owner of the land, and authorizes him to sell and convey one-half of the same, and apply the proceeds to his own use, even if not sufficient to work an estoppel by deed as against persons claiming under T, issufficient as evidence to make out *prima facie* a title in W, and is admissible in trespass to try title by the heirs of W.—WALLACE V. PRUITT, Tex., 20 S. W. Rep. 728.

116. VENDOR AND VENDEE—Exchange of Homestead. —The owner of 160 acres of farming land, occupied by himself, wife, and children as a homestead, agreed to exchange it for a stock of merchandise, but his wife did not sign the contract, and there was no joint consent for the alienation of the homestead. Before the exchange was completed, the owner of the homestead declined to carry out the contract: Held, in an action to recover damages for its violation, that the contract was void and the noncompliance with its provisions afforded the plaintiffs no ground for a recovery.—HODGES V. FARNHAM, Kan., 31 Pac. Rep. 606.

117. VENDOR'S LIEN—Deed of Trust.—A vendor's lien for purchase money is not lost, as to persons charged with notice, by the taking of a mortgage on the same land to secure the vendee's notes for the price.—HANNA V. DAVIS, Mo., 20 S. W. Rep. 686.

118. VENDOR'S LIEN—Priorities.—Where a mortgage is executed to a firm, knowledge by one of them that the mortgagor had failed to pay at least part of the purchase price is sufficient to put the mortgagees on inquiry; and where such inquiry, prosecuted with diligence, would have led to the discovery that no part of the purchase money had been paid, and that the mortgagor's vendor had retained a lien on the land for the full amount of the agreed price, the vendor's lien is superior to the mortgage.—OVERALL V. TAYLOR, Ala., 11 South. Rep. 738.

119. WILL — Attesting Witnesses — Legatee.—Under Rev. St. 1889, § 8903, which provides that the legacy bequeathed to an attesting witness shall be void, but his competency not affected, and section 8904, which provides that such witness shall be entitled to the same share of the testator's estate as he would have inherited, a legatee, though an heir or distributee, is a competent attesting witness.—GRIMM V. TITTMANN, Mo., 20 S. W. Rep. 664.

120. WILLS—Construction.—By the ninth clause of his will testator gave R, a grandson, certain real estate. The tenth clause provided that one-half of the residue of testator's estate should go to his son D for life, "and at his death his share goes to" R, forever. The eleventh clause provided that, if R "dies leaving no issue, I give his share above indicated to my six children, share and share alike." R died intestate, without issue: Held, that R's "share," mentioned in the eleventh clause, only included the "share" mentioned in the tenth clause, and not the real estate given to him by the ninth clause.—TURNER V. BALFOUR, Conn., 25 Atl. Rep. 448.

121. WILLS—Construction.—Testator devised land to his wife during widowhood, remainder to his children, and provided that the portion of his daughter should "be invested in trustees," to be appointed by his executors, for the daughter's "own proper use," and at her decease to be divided among her children: Held, that such devise created a "dry" trust, which was executed by the statute, and the legal title in fee vested in the daughter.—ROBINSON V. OSTENDORFF, S. Car., 16 S. E. Rep. 371.

122. WILLS — Construction.—Testator gave certain property to his son A, and then provided that "this property thus specified by me, and given to my son A during his natural life, at his death I give and bequeath the same to his children, lawfully begotton heirs of his body, and their descendants, if he should have any to die, leaving children, during his natural life." The general scope of the instrument, often expressed, was to make the share of each of testator's children equal, and to limit the property devised and bequeathed to A and the other children to the natural life of each: Held, that the particular words which might raise a presumption of a fee-simple estate in A were controlled by the evident intention of testator that he should only take an estate for life, with remainder to his children. —HUNT V. BROOKS, Va., 16 S. E. Rep. 358.

123. WILL — Contest—Burden of Proof.—Though the burden is on proponents to establish all the facts essential to the validity of a will, where the probate thereof is contested, it is error to charge that, if there is "a doubt" left in the mind of the jury as to any one or all of these essentials, the jury must solve the doubt in favor of the contestant and against the will, since it requires too high a degree of proof.—BROWN V. WALKER, Miss., 11 South. Rep. 724.

124. WILLS—Extrinsic Evidence.—Extrinsic proof is inadmissible to show that the provision of a will devising all of testator's property to his wife "and to her heirs forever" was intended by testator as such a provision for his children as would take the will out of the operation of Gen. St. § 1465, which provides that a testator shall be deemed to die intestate as to such child or children, or, in case of their death, descendants of such child or children, "not named or provided for" in his will.—BOWER V. BOWER, Wash., 31 Pac. Rep. 598.

125. WITNESS—Transactions with Decedents.—Under Code, art. 35, § 2, providing that when an original party to a contract or cause of action is dead, or an executor or administrator is a party, either party may be called as a witness by his opponent, but shall not testify on his own offer, in an action for the breach of a lease by the lessee against the administrator of the lessor, plaintiff is disqualified to testify, though the breach occurred after the lessor's decease.—BIGGS V. MCCURLEY, Md., 25 Atl. Rep. 466.

ABSTRACTS OF DECISIONS OF MISSOURI COURTS OF APPEAL.

ST. LOUIS COURT OF APPEALS.

INSTRUCTIONS — Contract — Agency.—A contract of agency cannot be inferred from the mere fact, that one renders services for another without objection on the part of the person for whom such services were rendered, and that such fact amounts to an acceptance of such services with a promise to pay for the same. An instruction to that effect is erroneous. Reversed.—HIEMIENZ V. GOERGER.

HUSBAND AND WIFE—Maintenance—§ 6856, R. S. 1889.—

In order that a married women may sustain a petition under § 6856, R. S. 1889, a against her husband for maintenance for herself and children of that marriage, held necessary that abandonment and the refusal or neglect to maintain and provide for her must be shown, both of these conditions must concur. Reversed.—DROEGE v. DROEGE.

JUSTICE OF THE PEACE—Appeal—Judge's Fee—§ 17, 2 R. S. 1889, p. 2148.—The only penalty provided, in § 17, 2 R. S. p. 2148, for failing to pay filing fee is, that clerk shall not file transcript until fee is paid, and though failure to pay filing fee, so as to entitle cause to be docketed, will amount to a failure to prosecute the appeal, yet no default can be predicated upon failure of appellant, when fee is paid and cause docketed at commencement of the term to which appeal is returnable. Reversed.—MEITZ v. KOETTER.

MISDEMEANOR—Act April 1st. 1891—Laws 1891, p. 122.—An information under the Act of Apr. 1st. 1891, Laws 1891, p. 122, which is not challenged for insufficiency by motion to quash and where defendant did not file a motion in arrest after conviction, held, not insufficient on appeal, when point is first raised in appellate court, if it informs defendant fully of the offense of which he stands charged and where alleged defect in the information prejudices no substantial rights of the defendant. Affirmed.—STATE v. TOWNSEND.

PRACTICE—Appeals—§ 2257, R. S. 1889.—On motion of respondent to affirm the judgment of the trial court for default of appellant in not ordering clerk to make out a transcript after the bill of exceptions was filed, thereby causing delay, held, that § 2257, R. S. 1889, requires appellant in all cases, where a bill of exceptions is filed, to inform clerk of circuit court at once, whether he desires a perfect transcript of all the proceedings, or merely a transcript of record entry of judgment and appeal, as he has the option to take either, and he is in default if he fails so to notify the clerk. Motion overruled on conditions stated in the opinion.—MESSICK v. FAIRBURN.

PRACTICE — Justice Courts — Pleading.—There is no such thing known to the law as demurrer to a statement filed in a justice's court; there can therefore be no such thing as a judgment upon demurrer in proceedings originating before a justice. Therefore held error for circuit court to enter final judgment on the demurrer to plaintiff's statement, upon the plaintiff's failing to name his statement. Reversed.—KANE v. DAUERHEIM.

REPLEVIN—Mortgage—Note.—In an action of replevin for the possession of certain household goods, where plaintiff claims title to the goods as the holder of a note for collection, which note is secured by mortgage on the goods, held that, as plaintiff, the holder of the note for collection, could maintain an action at law on the note in his own name, and after condition broken on the mortgage, subject to the equities which the payee has against the owner, he was properly nonsuited. Reversed.—WILLISON v. SMITH.

STATUTE OF LIMITATIONS—Agency.—In a suit by the principal to recover money paid to his agent authorized to collect same, held that the statute of limitations does not commence to run against an action by a principal against his agent, until the principal has been notified or has acquired knowledge that the agent has collected the money, and possibly not until demand made by the principal. Reversed.—CARDER v. PRIMM, ADMR.

SALES—Reasonable Time.—Goods exposed to pillage at place of delivery must, as a matter of law, be accepted by the vendee without delay in the absence of proof of a custom of trade to the contrary and in the absence of all excuses for non-acceptance. A delay of from three or four days after such goods are tendered is unreasonable. Affirmed.—MORELL v. KOERNER—PARKER LUMBER CO.

KANSAS CITY COURT OF APPEALS.

JURISDICTION—Objections Made Where.—An application for change of venue alleged the prejudice of the inhabitants of the county, but made no objection to the judge of that court. The court against defendant's exceptions, sent the case to a court in an adjoining circuit, where defendant appeared and went to trial without objection: Held, an objection for want of jurisdiction, not of the subject-matter, or of such class of cases, but for cause personal in its nature, should be made to the court which is exercising the unwarranted power; otherwise, there is a voluntary submission of the cause to a court clothed with authority to try such cases.—MOORE v. THE WABASH RY. CO.

MECHANIC'S LIEN—Husband and Wife.—A contract made by the owner is the basis of every mechanic's lien against real estate. The husband has possession under his marital rights of wife's land, and may improve it for his own benefit. The fact that the wife saw the plaintiff at work, and made no objections, is not sufficient to bind her to the husband's contract. She is bound by such contract only when he acts as her agent. The husband's building, erected upon the wife's land, of which he has possession, may be charged with the lien.—KLINE v. PERRY.

PARTNERSHIP—Liability of Incoming Partners.—An incoming partner is not liable for debts contracted before he enters the partnership. For such debts no member of the firm can, by using the firm name, bind the incoming partner. An agreement, expressed or implied, is necessary to create such liability, not only between the creditors and the new firm, but, also, between the partners. A note executed by one member of a trading partnership, in the firm name, will be presumed to have been made on account of the firm's business. When this is overcome, the plaintiff must prove that the incoming partner agreed to become liable for his debt. The presumption is against the assumption of such liability.—WHEELER v. SANDUSKY.

PLEADING.—In an action for damages under Sec. 2611 R. S. 1889, the statement set out that the animals came upon the track and were killed because of "the failure of defendant to construct and maintain lawful fences, openings, gates, cattle guards and farm crossings at the place where said animals went upon said railroad:" Held, the statement set out but one cause of action. A defect in the gate is a defect in the fence.—WOOD v. THE MO. K. & T. RY. CO.

PLEADING—Amendment.—After appeal taken by defendant from justice's judgment to the circuit court, plaintiff may in the circuit court amend his petition so as to correct a mistake in the name of the party plaintiff. Such an amendment is not a substantial change in the cause of action.—SIBLEY v. SWEED.

PLEADING—Evidence of Waiver.—In an action on a policy of insurance to enforce payment of loss: Held, the allegation in the petition that plaintiff had complied with all the conditions of said policy on his part, is sufficient to let in proof of waiver of such conditions as the furnishing of proof of loss.—FULTON v. THE PHŒNIX INS. CO.

RAILWAYS — Passenger on Freight Train.—One who takes passage on a freight train ought not to expect the same conveniences as when on a passenger train. Though he must be treated as a passenger by the carrier receiving him as such, it is assumed that he will uncomplainingly put up with the inconveniences which reasonably attend such mode of travel. When the caboose is stopped at the platform, or reasonably near thereto, and remains there long enough for passengers to get on and off, the defendant has done its full duty, and no one has a right to assume that the caboose will be again pulled up and stopped at the platform.—HAYS v. WABASH RY. CO.

STATUTE OF LIMITATIONS—Promissory Note.—A credit endorsement having been made on the note by the payee, at a time less than ten years after the execution of said note, and less than ten years before the bringing of suit thereon, the presumption is that actual payment was made at that time, and this is sufficient evidence to take the note out of the operation of the statute of limitations.—SMITH v. ZIMMERMAN.

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